ILE COPY

Office-Supreme Court, U.S.
FILED
JAN 26 1961
JAMES R. BROWNING, Clerk

No. 55

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

UNITED STATES OF AMERICA,
Appellant

v.

E. I. du PONT de NEMOURS AND COMPANY, et al.,
Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEE GENERAL MOTORS CORPORATION

LEO F. TIERNEY,
ROBERT L. STERN,
BRYSON P. BURNHAM,
LEE N. ABRAMS,
231 South La Salle Street
Chicago 4, Illinois

HENRY M. HOGAN,
ROBERT A. NITSCHKE,
3044 West Grand Boulevard
Detroit 2, Michigan
Attorneys for General Motors Corporation

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT,
Of Counsel

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
A. This Court's Decision	3
B. Proceedings in the District Court	4
C. The Decision of the District Court	9
D. The Judgment of the District Court	14
SUMMARY OF ARGUMENT	18
ARGUMENT	25
Introduction	25
(a) The Government disregards the mandate of this Court	26
(b) The Government disregards the principal issue upon which evidence was taken in the court below	26
(c) The Government disregards most of the evidence of record and the findings reasonably based thereon	28
I. THE DECREE COMPLIES WITH THE MANDATE OF THIS COURT	30
A. The Decree Eliminates the Offensive Effects of the Acquisition	30
B. The Decree Leaves du Pont with No More Than an Investment Interest which Is Not Offensive to the Statute	38
C. The Government's Arguments that the Decree Does Not Comply with the Mandate Have No Basis in Fact	40
D. The Cases Relied on by the Government Do Not Establish that the Decree would be Ineffective	48

PAGE

II. THE DISTRICT COURT, IN FRAMING THE DECREE, PROPERLY CONSIDERED THE POSSIBLE CONSEQUENCES; THE FINDINGS THAT DIVESTITURE WOULD HARM INNOCENT PERSONS ARE FULLY SUPPORTED BY THE EVIDENCE 53

A. The District Court Applied the Proper Standards in Framing Its Decree 53

B. The Evidence Supports, and in Fact Compels, the District Court's Findings as to the Harmful Consequences of Divestiture. 61

1. Divestiture would substantially increase the available supply of General Motors stock 65

2. Forced divestiture would reduce the demand for General Motors stock, and new demand sufficient to absorb the additional supply would arise only at substantially lower prices 72

3. The impact on the market price of General Motors stock would be severe 80

4. Divestiture would seriously injure the stockholders of General Motors 84

5. Divestiture would impair General Motors' ability to raise equity capital .. 87

C. The Evidence on which the Government Relies Does Not Show that Divestiture Can Be Accomplished Without Harm to Innocent Stockholders 91

D. General Motors' Needs for Its Own Stock Are Not a Source of Demand which would Prevent Divestiture from Depressing the Market Price of That Stock 106

PAGE

III. DIVESTITURE IS NOT MANDATORY IN THIS CASE 109

A. Section 15, Under which This Case Arises, Does Not Make Divestiture Mandatory ... 110

B. Section 7 Does Not Make Divestiture Mandatory 117

C. Section 11 Does Not Require Divestiture in Cases Brought Under Section 15 121

1. Section 11 does not limit the discretionary powers of district courts proceeding under Section 15 122

2. Section 11 does not require administrative agencies to order divestiture in all Section 7 cases 126

CONCLUSION 131

APPENDIX 132

CITATIONS

Cases

Aluminum Company v. Federal Trade Commission, 284 Fed. 401 (C.C.A. 3), certiorari denied 261 U.S. 616 118

American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, affirmed 259 F.2d 524 (C.A. 2) 36, 115

American Trucking Associations v. United States, 355 U.S. 141 126

American Trucking Associations v. United States, 364 U.S. 1 126

Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 291 U.S. 587 ..... 125, 130

Associated Press v. United States, 326 U.S. 1 ... 27, 51, 120

Benanti v. United States, 355 U.S. 96 125

PAGE

United States v. Crescent Amusement Co., 323 U.S. 173 ..... 50, 52, 59, 60, 116

United States v. General Shoe Corp., CCH Trade Cases, §68,271 116

United States v. W. T. Grant Co., 345 U.S. 629 ..... 24, 25, 115, 123

United States v. Great Lakes Towing Co., 208 Fed. 733, 217 Fed. 656, appeal dismissed 245 U.S. 675 ... 51, 114, 120

United States v. Hertz Corp., CCH Trade Cases, §69,762 117

United States v. Hilton Hotels Corp., CCH Trade Cases, §68,253 117

United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215 51

United States v. Keystone Watch Case Co., 218 Fed. 502, appeal dismissed 257 U.S. 664 51

United States v. Lehigh Valley R. R. Co., 254 U.S. 255 ..... 50, 53

United States v. Loew's, Inc. (Warner Bros.), CCH Trade Cases, §62,765 37

United States v. Lucky Lager Brewing Co. of San Francisco, CCH Trade Cases, §69,160 117

United States v. Minnesota Mining and Manufacturing Co., 96 F. Supp. 356 ..... 51, 57

United States v. Minute Maid Corp., CCH Trade Cases, §68,131 117

United States v. Paramount Pictures (RKO), CCH Trade Cases, §62,335 37

United States v. Paramount Pictures, 334 U.S. 131 ... 36

United States v. Reading Co., 253 U.S. 26 ..... 49, 50

United States v. Swift & Co., 286 U.S. 106 33

United States v. Schenley Industries, Inc., CCH Trade Cases, §68,664 116

United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 ..... 51, 114, 120

PAGE

United States v. Union Pacific R. R. Co., 226 U.S. 61, 226 U.S. 470 ..... 50, 51, 53

United States v. United Shoe Machinery Corp., 110 F. Supp. 295, affirmed 347 U.S. 521 ..... 51, 59

United States v. United States Gypsum Co., 340 U.S. 76 ..... 42, 44

Wabash R. Co. Control, 247 ICC 365 37

STATUTES

Clayton Act §7 (15 U.S.C. §18) ... 26, 36, 37, 38, 42, 109, 116, 117, 120, 122, 123, 126, 127

Clayton Act §8 (15 U.S.C. §19) 123

Clayton Act §11 (15 U.S.C. §21) 117, 121, 122, 124, 127

Clayton Act §15 (15 U.S.C. §25) 110, 112, 113, 116, 117, 121, 123

Internal Revenue Code of 1954, §§1081-1083 (26 U.S.C. §§1081-1083) 105

Public Utility Holding Company Act (15 U.S.C. §79 *et. seq.*) 48

Rule 52 (a), Federal Rules of Civil Procedure 61

Sherman Act §4 (15 U.S.C. §4) 112, 114, 115, 126

MISCELLANEOUS

Bearle and Means, *The Modern Corporation and Private Property* (1933) 35

Blair-Smith and Helfenstein, *A Death Sentence or a New Lease on Life?*, 94 U. of Pa. L. Rev. 148 105

Gerstenberg, *Financial Organization and Management* (2nd Ed., 1948) 35

Guthmann and Dougall, *Corporate Financial Policy* (3rd Ed., 1955) 35

H. Rept. No. 627, 63rd Cong., 2nd Sess. 112

S. Rept. No. 698, 63rd Cong., 2nd Sess. 113, 124

PAGE

Stevens, *Voting Rights of Capital Stock and Shareholders*, 11 Journal of Business of the University of Chicago 311 35

51 Cong. Rec. 14514, 15944, 16321 113

51 Cong. Rec. App. 1181 113

Securities and Exchange Commission Statistical Series, Release No. 1680 75

Securities and Exchange Commission, 25th Annual Report 105

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

NO. 55

UNITED STATES OF AMERICA,
Appellant

v.

E. I. du PONT de NEMOURS AND COMPANY, et al.,
Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEE GENERAL MOTORS CORPORATION

OPINION BELOW

The opinion of the District Court outlining the relief to be granted is reported in 177 F. Supp. 1 (R. 3184-3265). The opinions of the District Court and of this Court on the issue of antitrust violation are reported in 126 F. Supp. 235 and 353 U.S. 586, respectively.

JURISDICTION

The jurisdiction of the District Court over the Clayton Act phase of this case is conferred by Section 15 of that Act (38 Stat. 736, 15 U.S.C. §25). The final judgment of the District Court, following remand by this Court, was

entered on November 17, 1959 (R. 3300), and notice of appeal was filed on January 14, 1960 (R. 3314). This Court noted probable jurisdiction on May 23, 1960 (R. 3317). The jurisdiction of this Court to review the judgment below on direct appeal is invoked under Section 2 of the Act of February 11, 1903 (32 Stat. 823, as amended, 15 U.S.C. §29).

QUESTIONS PRESENTED

The basic question presented is:

1. Whether the decree of the District Court complies with this Court's mandate directing the determination of "equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute in conformity with the opinion of this Court" (R. 2).

The following corollary questions are also presented:

2. Whether the District Court, exercising its "large discretion to model * * * [its] judgments to fit the exigencies of the particular case" (353 U.S. at 607-608), properly considered the adverse effects which proposed relief would have on persons not charged with illegal conduct.

3. Whether the evidence supports the District Court's findings that a divestiture decree would seriously injure hundreds of thousands of innocent persons.

4. Whether the Clayton Act requires district courts to order divestiture whenever Section 7 has been violated, without regard to the availability of other less drastic remedies which would effectively eliminate the offensive consequences of a particular acquisition.

STATUTES INVOLVED

The statutes involved are Sections 7, 15 and (according to the Government) 11 of the Clayton Act prior to the 1950 Amendment (38 Stat. 731, 734, 736, 15 U.S.C. §§18, 21, 25). These provisions are set forth in the Appendix to this Brief, *infra*, pp. 132-135.

STATEMENT

The Government's original complaint charged du Pont and General Motors with violating Sections 1 and 2 of the Sherman Act and du Pont with violating Section 7 of the Clayton Act. The District Court found that the evidence did not support the Government's allegations, and dismissed the case (126 F. Supp. 235).

A. This Court's Decision.

On appeal by the Government, this Court did not disturb the trial court's dismissal of the Sherman Act charges against du Pont and General Motors (353 U.S. 586), but held that du Pont had violated Section 7 of the Clayton Act because there was a reasonable probability that du Pont's potential power to influence General Motors' purchasing policies might result in restraint or monopolization of the commerce in automotive finishes and fabrics. The case was therefore (353 U.S. at 607-608):

> "• • • remanded to the District Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401."

B. **Proceedings in the District Court.**

Upon remand, the District Court directed the parties to file proposed plans for compliance with the mandate (R. 10-11). Decrees were proposed by the Government (R. 11-17), by du Pont (R. 19-25), and by *amici curiae* appointed by the District Court to represent the stockholders of du Pont and General Motors (R. 10, 30-45, 47-55).* The District Court conducted hearings from February 16, 1959 to April 9, 1959, in which evidence was submitted with respect to the decrees which had been proposed (R. 260-3182). On October 2, 1959, the District Court handed down an opinion containing its findings of fact and conclusions with respect to the form which the decree should take (R. 3183-3265). On November 17, 1959, the court entered a final decree (R. 3300-3312) in conformance with its opinion. This decree differed from any of those submitted by the parties, although it contained elements from all.

The decree proposed by the Government called for complete divestiture of the General Motors stock owned by du Pont, Christiana and Delaware (R. 11-17).** It would

---

* General Motors proposed no decree, since its position was that it had not been found to have acted unlawfully and that, therefore, no relief could be granted against it (R. 28).

** Christiana Securities Company owns 26.7% of du Pont common stock; Delaware Realty and Investment Company, a holding company owned by members of the du Pont family, owns 32.7% of the common stock of Christiana and 2.7% of the common stock of du Pont. (Computed from GX 692, R. 2634, 3020; CX 4, R. 1551, 3076-3077; CX 5, R. 1551, 3081). Du Pont owns 63,000,000 shares of General Motors stock, Christiana owns 535,500 shares, and Delaware none (GX 692, R. 2634, 3016; CX 4, R. 1551, 3076; CX 5, R. 1551, 3081).

[The record references which follow the exhibit numbers are first to the page where the exhibit was admitted and then to the page where the pertinent part of the exhibit appears in the record. The exhibits begin at Volume IV, R. 2640. Government exhibits are referred to as GX, du Pont exhibits as DPX, General Motors exhibits as GMX, Christiana exhibits as CX, and Amicus Dallstream exhibits as ADX.]

have directed du Pont, Christiana and Delaware to convey their General Motors stock to a court-appointed trustee, who would have been required to dispose of the stock within ten years. Each du Pont stockholder would have received in ten equal annual installments his pro rata share of the 63,000,000 shares of General Motors stock owned by du Pont, except that the 19,134,615 shares of that stock allocable to Christiana, Delaware and the stockholders of Delaware as stockholders of du Pont* (as well as the 535,500 shares of General Motors stock directly owned by Christiana) would have been sold by the trustee for their accounts over the same ten-year period (R. 14-15).

During that divestiture period, the du Pont stockholders entitled to receive distributions of General Motors stock would have had the right to vote (on a pro rata basis) all of the undistributed and unsold stock held by the trustee (R. 13-14).** Dividends on the undistributed and unsold stock would have been paid to the trustee for transmittal to du Pont and Christiana (R. 13).

The Government plan would also have enjoined du Pont, Christiana and Delaware from acquiring or holding any General Motors stock (R. 15), and from exercising or attempting to exercise any control or influence over General Motors (R. 15). General Motors on the one hand, and du Pont, Christiana and Delaware on the other, would have been enjoined from having any officer or director who was also an officer or director of the other (R. 16). Finally,

---

* The figures at pp. 8-9 of the Government brief erroneously omit 651,118 shares of du Pont's General Motors stock allocable to stockholders of Delaware as stockholders of du Pont. See DPX 51, R. 2229, 3057.

** Prior to the first distribution, those stockholders would thus have had the right to vote the entire 63,535,500 shares of General Motors stock owned by du Pont and Christiana.

the Government plan would have required General Motors and du Pont to cancel all agreements which provide:

> "(1) that General Motors purchase any specified percentage of its requirements of any product from du Pont, (2) that either defendant grant to the other *any exclusive patent rights, or (3) that General Motors* grant to du Pont either the first or a preferential right to manufacture or sell any chemical discovery made by General Motors * * *." (R. 15-16.)

General Motors and du Pont would have been enjoined from entering into such agreements in the future, and from entering into or continuing any arrangement for joint ownership or operation of any commercial or manufacturing enterprise or from knowingly holding stock therein (R. 16).

The other parties filed objections to the Government plan, alleging that the drastic relief of forced divestiture through sale and distribution of du Pont's 63,000,000 shares of General Motors stock (and Christiana's 535,500 shares) was not "necessary" to "eliminate the effects of the acquisition offensive to the statute." (See R. 3188-3189.) They also contended that the Government plan was not "appropriate in the public interest," because it would substantially depress the market price of both General Motors and du Pont stock and would impose a confiscatory tax burden on the du Pont stockholders, thereby causing serious injury to numerous innocent persons. At the same time, du Pont proposed a decree (R. 19-27) which would have deprived du Pont of the right to vote its General Motors stock and would have permitted du Pont representation on the General Motors board of directors only with court approval. Under that decree, the ultimate stockholders of du Pont, Christiana and Delaware would have been given the right to vote du Pont's General Motors stock, but trade relations between du Pont and General Motors would not have been restricted.

The *amici curiae* appointed by the District Court to represent the du Pont and General Motors stockholders filed objections criticizing both the Government decree and the du Pont decree. The *amici* objected to the adverse tax and market consequences of the Government decree, but they regarded the du Pont decree as inadequate because it contained no injunctive provisions with respect to trade relations between General Motors and du Pont and allowed du Pont to be represented on the General Motors board.*

In a memorandum filed in September, 1958, the Government replied to the various objections, and suggested possible modifications in its basic plan. As the District Judge noted in his opinion, however, the Government never indicated its willingness to accept any of its own suggested modifications (R. 3192):

> "• • • It appeared, however, that the Government's discussion of these suggestions was not intended to indicate that the Government was prepared to modify its plan in accordance with the suggestions or would consent to any such modification. At a later point in the hearing the chief counsel for the Government stated that he had no authority to propose or to consent to any change in the Government's proposed judgment."

The "later point in the hearing" to which the District Judge referred came when defendants were preparing to rest their case. One of defense counsel, concerned lest the Government thereafter propose a new decree as to which no evidence had been introduced, stated "that the time has come in this hearing when the Government should take

---

* The *amici* also proposed remedial decrees (R. 30-45, 47-55) which called for the pass-through of voting rights on du Pont's General Motors stock, but prohibited officers and directors of du Pont, Christiana and Delaware (and relatives residing in their households), as well as certain other persons, from exercising the passed-through voting rights. Amicus Dallstream proposed trade restrictions similar to those in the Government plan (R. 38-39).

some final and formal position with respect to the form of judgment that it is asking or going to ask the Court to enter" (R. 2290). He referred to earlier occasions when the Government "began to shift and to turn away from its position, so that I at least feel that I am not sure exactly what the Government is now proposing that the Court should do" (R. 2290). He then insisted, with what has been proved to be remarkably accurate foresight,

> "* * * that we really should know, before the evidence closes in this case, what the Government is proposing. I think it would be unfair to the parties and unfair to the Court if we, for the first time, were presented with some brand new Government plan, some new proposed judgment in the briefs, where, after the case has been closed and when the parties have no opportunity to really direct their attention to that plan and to present any evidence that the change in the plan seems to require." (R. 2291.)

In an ensuing colloquy, Government counsel indicated that the Government intended to rely solely on its original decree (R. 2292):

> "I might also add that it is rather an obvious thought that the judgment which we did file was approved by not only the Assistant Attorney General, but the Attorney General, and that while I am authorized here to represent the Government, I have no authority to change the decisions they make.
>
> "The Court: It is my understanding then that you are standing on the decree that you proposed before this hearing started?
>
> "Mr. Reycraft: That is right, sir."

When defense counsel indicated that defendants might seek a further hearing if the Government submitted "a brand new proposal," the District Judge stated (R. 2293):

"From what Mr. Reycraft has said, I am assuming that that is the decree, with probably minor changes."

Government counsel replied, "I have nothing further, your Honor" (R. 2293). On the basis of that commitment, the defendants recalled one witness, and then rested their case.

C. **The Decision of the District Court.**

The District Court recognized that its paramount duty was the formulation of a decree which would "effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist." (R. 3196. See pp. 54-56, *infra*.) At the same time, cognizant of this Court's admonition that the relief granted should be "in the public interest" (353 U.S. 607), the District Court considered the impact which the proposed remedies might have on innocent persons, stating that:

> "• • • It would be unreasonable and unjust for the Court to adopt measures which are certain to result in losses to innocent stockholders when the effects offensive to the statute can be eliminated by measures which will not result in such consequences." (R. 3247.)

Because du Pont's potential ability to influence General Motors' purchasing policies created the probability of offensive effects upon competition, the District Court sought to eliminate those effects by closing the avenues through which such influence might be exerted. The court pointed out that "in the trial in chief and before the Supreme Court the Government relied primarily upon du Pont's voting rights and upon the participation of its representatives in the affairs of the Board of Directors of General Motors as the avenues and means which had been used or could be used by du Pont to influence the conduct of General Motors" (R. 3245). The court therefore concluded that du Pont, Christiana and Delaware (and their officials)

should be stripped of all right to vote General Motors stock, should be denied representation on General Motors' board of directors and policy committees, and even should be prohibited from having any common employees with General Motors.

The court found that divestiture of these rights incident to stock ownership would leave du Pont with only the legal title, the right to receive dividends, the right (subject to certain limitations) to dispose of the stock, and the right to share in General Motors' assets in the event of dissolution (R. 3243-3244; Article III, R. 3301). Those "attributes of ownership", the court concluded, could not "be used to influence the practices and policies of General Motors"; they would not leave General Motors with any "motive" or "considerations of self-interest, to favor du Pont" (R. 3244-3245).

The court held that divestiture was not required by the statute, and that the Government's proposed divestiture of du Pont's complete legal title to the stock was not necessary to eliminate the offensive effects of the acquisition. In view of the Government's insistence on divestiture, the court stated (R. 3246-3247):

> "The question remains whether divestiture should be ordered even though it is not necessary in order to prevent the consequences condemned by the statute. It is in relation to this point that the Court is required to consider what the consequences of divestiture of the legal title would be to the shareholders of both du Pont and General Motors."

After analyzing both the tax and market consequences of divestiture, the court concluded that such relief would cause substantial injury to over 900,000 (R. 3196) owners of du Pont and General Motors stock (R. 3247):

"* * * On the record there can be no doubt that divestiture of the legal title would have serious adverse consequences to these stockholders."

The District Court's findings with respect to the tax consequences of the Government plan were based primarily on an Internal Revenue Service ruling (ADX 2, R. 1313, 3171-3182) that the annual distributions of General Motors stock provided for in that plan would be taxable to the recipients (the du Pont stockholders) as ordinary income. Thus, individual du Pont stockholders would be taxed at rates from 20% to 91% (less the dividends received credit) on the fair market value of the stock distributed ($43 per share at the date of this brief);* corporate shareholders, on the other hand, would be taxed at an effective rate of 7.8%** of $2.09 per share of General Motors stock received (du Pont's tax basis). Furthermore, Christiana, Delaware and the stockholders of Delaware would be subject to capital gains taxes on the sales made by the trustee for their accounts.†

Characterizing these tax consequences as a "grossly unfair * * * penalty on thousands of innocent persons" (R. 3204), the court concluded with respect to the heavy tax burden which would be imposed on individual (non-corporate) du Pont stockholders (R. 3247):

---

* State income taxes would also be imposed in many instances (R. 3204; DPX 54, R. 2229, 3058A).

** A credit of 85% is allowed on intercorporate dividends; 52% (the normal corporate income tax rate) of the remaining 15% is 7.8%.

† It was computed that on the basis of a market value of $46 per share for General Motors stock, Christiana and Delaware would pay more than $200,000,000 in capital gains taxes (R. 3210; CX 8, R. 1556, 3084C); no data is available as to the capital gains taxes which would be payable directly by the stockholders of Delaware. The burden of the tax imposed on Christiana and Delaware, of course, really would fall on the stockholders of those companies, including the numerous charitable and educational institutions which own Christiana stock (R. 3211, 3225-3226).

should be stripped of all right to vote General Motors stock, should be denied representation on General Motors' board of directors and policy committees, and even should be prohibited from having any common employees with General Motors.

The court found that divestiture of these rights incident to stock ownership would leave du Pont with only the legal title, the right to receive dividends, the right (subject to certain limitations) to dispose of the stock, and the right to share in General Motors' assets in the event of dissolution (R. 3243-3244; Article III, R. 3301). Those "attributes of ownership", the court concluded, could not "be used to influence the practices and policies of General Motors"; they would not leave General Motors with any "motive" or "considerations of self-interest, to favor du Pont" (R. 3244-3245).

The court held that divestiture was not required by the statute, and that the Government's proposed divestiture of du Pont's complete legal title to the stock was not necessary to eliminate the offensive effects of the acquisition. In view of the Government's insistence on divestiture, the court stated (R. 3246-3247):

> "The question remains whether divestiture should be ordered even though it is not necessary in order to prevent the consequences condemned by the statute. It is in relation to this point that the Court is required to consider what the consequences of divestiture of the legal title would be to the shareholders of both du Pont and General Motors."

After analyzing both the tax and market consequences of divestiture, the court concluded that such relief would cause substantial injury to over 900,000 (R. 3196) owners of du Pont and General Motors stock (R. 3247):

"* * * On the record there can be no doubt that divestiture of the legal title would have serious adverse consequences to these stockholders."

The District Court's findings with respect to the tax consequences of the Government plan were based primarily on an Internal Revenue Service ruling (ADX 2, R. 1313, 3171-3182) that the annual distributions of General Motors stock provided for in that plan would be taxable to the recipients (the du Pont stockholders) as ordinary income. Thus, individual du Pont stockholders would be taxed at rates from 20% to 91% (less the dividends received credit) on the fair market value of the stock distributed ($43 per share at the date of this brief);* corporate shareholders, on the other hand, would be taxed at an effective rate of 7.8%** of $2.09 per share of General Motors stock received (du Pont's tax-basis). Furthermore, Christiana, Delaware and the stockholders of Delaware would be subject to capital gains taxes on the sales made by the trustee for their accounts.†

Characterizing these tax consequences as a "grossly unfair * * * penalty on thousands of innocent persons" (R. 3204), the court concluded with respect to the heavy tax burden which would be imposed on individual (non-corporate) du Pont stockholders (R. 3247):

---

* State income taxes would also be imposed in many instances (R. 3204; DPX 54, R. 2229, 3058A).

** A credit of 85% is allowed on intercorporate dividends; 52% (the normal corporate income tax rate) of the remaining 15% is 7.8%.

† It was computed that on the basis of a market value of $46 per share for General Motors stock, Christiana and Delaware would pay more than $200,000,000 in capital gains taxes (R. 3210; CX 8 R. 1556, 3084C); no data is available as to the capital gains taxes which would be payable directly by the stockholders of Delaware. The burden of the tax imposed on Christiana and Delaware, of course, really would fall on the stockholders of those companies, including the numerous charitable and educational institutions which own Christiana stock (R. 3211, 3225-3226).

> "If the Government plan were to be adopted and the General Motors stock should be distributed by du Pont in addition to its usual cash dividends, the tax consequences would be extraordinarily severe and as explained above would in effect amount to a capital levy on the market value of the General Motors stock ranging in amount from 20% to 91%, and averaging perhaps 50-60% (less the dividends received credit), depending upon the tax brackets of individual stockholders."

The court had previously found reliable a survey indicating that the "order of magnitude" of the federal income taxes on individual owners would range from $770,000,000 to a billion dollars (R. 3205-3206).

With respect to market consequences, the court reviewed the evidence at length (R. 3212-3234). This evidence, which is summarized more fully in Point II *infra*, pp. 65-84, showed that adoption of the Government plan would substantially increase the supply of General Motors stock on the market while decreasing the demand for that stock, thus inevitably depressing its price. The substantial increase in the supply of General Motors stock on the market would result from the forced sale of almost two million shares of General Motors stock annually for ten years (the stock allocable to Christiana, Delaware and the stockholders of Delaware; see p. 5, *supra*), additional sales by du Pont stockholders who would sell the distributed General Motors stock for tax and other reasons, and sales by other General Motors shareholders fearing a decline in the value of their investment. At the same time, adoption of such a plan would decrease the demand for General Motors stock by reducing its attractiveness as an investment and by substantially increasing (through distributions by the trustee) the General Motors holdings of many institutional investors who might otherwise constitute large

potential sources of new demand. Consequently the price of that stock would be forced substantially below what it otherwise would be.

The District Court found that the "kind of distribution" proposed by the Government would:

> "• • • have adverse consequences on the market value of both General Motors and du Pont stock. The extent of those consequences is in dispute. This is a matter that cannot be measured with any degree of certainty. But the record satisfies the Court that there would be adverse consequences and that they would be substantial. Although much of the evidence offered by both sides was concerned with measuring the adverse consequences of the Government's proposed divestiture of legal title, there is no need for the Court to resolve the conflict in the evidence as to how severe those consequences would be. The Court is persuaded beyond any doubt that a judgment of the kind proposed by the Government would have very serious adverse consequences." (R. 3247.)

The court concluded that:

> "On the Government's own evidence, there would be a serious risk that the sales caused directly and indirectly by its proposed decree would depress the market value of the two stocks and cause substantial losses to the many thousands of direct or indirect holders of such stocks who cannot conceivably be called guilty persons or even persons aware of any illegality." (R. 3263.)

The court also "considered whether there might be modifications of the Government's plan or other forms of divestiture of the legal title which might reduce or mitigate these adverse consequences" (R. 3248), and stated:

> "The modifications of the Government's plan which were discussed in the hearing would not, in the opinion

of the Court, remove these adverse consequences although they might mitigate their severity to some extent."*

(R. 3249):

"The Court does not believe that there is any method of divesting legal title to the General Motors stock now held by du Pont which would not either impair the value of the property interests involved or impose severe tax consequences upon the stockholders of the du Pont Company."

D. **The Judgment of the District Court.**

The main provisions of the judgment entered by the District Court deprive du Pont of the right to vote its General Motors stock and to be represented in General Motors management, and also impose stringent restrictions on trade relations between the two companies.

Articles VI and VII of the decree (R. 3304-3309) divest du Pont of the right to vote its General Motors stock, allocating that right on a pro rata basis among the more than 200,000 du Pont stockholders. Certain du Pont stockholders

---

* The only modifications to which evidence was directed were (1) extension of the time for divestiture from ten to twenty years; (2) complete divestiture in one year; and (3) distribution by du Pont of its General Motors stock in lieu of all or part of its regular dividend rather than in addition thereto. The evidence showed that although extension of the divestiture period to twenty years might to some extent lessen the quantum of the depressing impact on the market price of General Motors stock, that impact would still be substantial and would be felt for a much longer period (R. 1545, 1610-1612, 1807-1808, 2014-2015, 2084-2085). Divestiture in one year would obviously flood the market with an oversupply of General Motors stock and seriously depress its price (R. 2091-2092, 2277). Distribution of the General Motors stock in lieu of a part of the regular du Pont dividend would also substantially increase the volume of sales by du Pont stockholders, thereby increasing the depressant effect on the market price. See p. 67, *infra*.

"who would be likely to perpetuate any common control of du Pont and General Motors" (R. 3257), however, are subjected to further restrictions. Christiana, Delaware and the officers and directors of du Pont, Christiana and Delaware (and relatives residing in their households) are prohibited (1) from exercising the voting rights which would otherwise be allocable to them as du Pont stockholders under Article VII, and (2) from exercising "directly or indirectly, voting rights in respect of General Motors stock which they or any of them hold of record or have the power to vote or the power to direct the vote" (Article VI *A*, R. 3304).* Du Pont, Christiana, Delaware and the individuals disfranchised under Article VI A are also enjoined "from attempting to influence, directly or indirectly, any person in any manner with respect to exercising voting rights in respect of any General Motors stock" (Article VI A, R. 3304).

The decree also eliminates du Pont's representation on General Motors' board of directors and policy committees. General Motors on the one hand, and du Pont, Christiana and Delaware on the other, are enjoined from having as a director, officer or employee any person who was an officer or director of the other at any time after the expiration of 90 days following the effective date of the decree, and from knowingly employing any person who is employed by the other at the same time (Article IV, R. 3302). Furthermore, du Pont, Christiana, Delaware, and their officers and directors are enjoined "from nominating any person for election as a director of General Motors, or from proposing

* General Motors is directed to disqualify the disfranchised persons from voting (Article VI B, R. 3305), and du Pont, Christiana and Delaware are directed to secure their written consents to be bound by the decree; those companies are enjoined from having directors or officers who have failed to file such consents (Article X, R. 3310). The consents have been filed. See First Report of Monitor to District Court, June 20, 1960.

any person for a position as an officer of General Motors" (Article IV, R. 3302). The effectiveness of this provision is insured by Article VII A (R. 3305), which prohibits exercise of the passed-through voting rights "in favor of the election of any person nominated or designated by, or held out in any way to be a representative of, du Pont."

The specific provisions of the decree eliminating du Pont's voting rights and its representation in General Motors management are supplemented by a general injunction prohibiting du Pont, Christiana and Delaware "from using or attempting to use, directly or indirectly," their stock ownership "to influence or control General Motors in any manner whatsoever" (Article III, R. 3302).*

In addition to depriving du Pont of the power potentially to influence General Motors' purchasing policies, the District Court carefully restricted the commercial relationships between the companies, so as to prevent any possibility of their "dealing with each other on a non-competitive or preferential basis" (R. 3257). Although stating that "the Court is not satisfied that injunctive provisions relating to trade of the character and scope proposed by the Government are necessary" (R. 3250), the court included injunctive provisions "more drastic than those proposed by the Government" (R. 3257).

Article V A of the decree (R. 3303) prohibits requirements contracts (with minor exceptions after three years), exclusive patent arrangements and arrangements relating to preferential use of discoveries, between General Motors and du Pont. Article V B (R. 3303-3304) enjoins du Pont, Christiana and Delaware on the one hand, and General

* Article III also enjoins du Pont, Christiana and Delaware from acquiring additional General Motors stock, except through the exercise of pre-emptive rights or as the result of a stock dividend payment by General Motors.

Motors on the other, from participating in any joint commercial venture or knowingly holding stock in the same enterprise. Article V D (R. 3304) prohibits General Motors from dealing with du Pont "on terms or conditions more favorable than those on which General Motors is willing to deal with competitors of du Pont," with respect to products developed by General Motors and patents, processes or discoveries in which General Motors has a proprietary interest. The court imposed similar restrictions on du Pont's dealings with General Motors (Article V C, R. 3304), despite the Government's failure to introduce any evidence "that du Pont had favored, or was favoring, or was likely to favor, General Motors in any way whatsoever." (R. 3259).

The decree further provides, in addition to the standard retention of jurisdiction provision (Article XII, R. 3312), that if legislation should ameliorate the tax consequences of divestiture "or if the provisions of this Judgment should prove inadequate to remedy the violation of the Clayton Act," any party may apply for modification thereof (Article IX, R. 3309-3310).

In holding that the decree does "eliminate the effects of the acquisition offensive to the statute," as required by this Court's mandate, the District Court concluded that (R. 3264):

> "The Court is of the opinion that there is nothing in the record which would support even by inference the conclusion that du Pont's possession of the bare legal title to General Motors stock, stripped of its right to vote and of its right to representation on the Board of General Motors, would create any possibility that the stock would have any influence on the practices and policies of General Motors or could be used in any way that would be inconsistent with the mandate of the Supreme Court."

SUMMARY OF ARGUMENT

I.

The fundamental question in this case, and indeed the only question, is whether the decree entered below complies with the mandate of this Court, which directed the determination of "equitable relief necessary and appropriate in the public interest to eliminate the *effects* of the acquisition offensive to the statute" (italics supplied) (R. 2).

That mandate was issued after this Court found that there was a reasonable probability that du Pont's use of its stock interest in General Motors might result in restraint or monopolization of the commerce in automotive finishes and fabrics. Throughout this case, the Government has contended that du Pont's right to vote General Motors stock and its representation in General Motors management gave it the power to influence General Motors' decisions. The decree of the District Court eliminates the offensive effects of the acquisition by closing those "avenues of influence" and by depriving du Pont of every attribute of its stock ownership which might possibly be used to affect General Motors' purchasing policies.

The conclusion that divestiture of voting rights and of representation in management is sufficient to eliminate stockholders' power to influence corporate decisions is in accord with the action of this and other courts (e.g., *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 426 (1945)), and of the Department of Justice, the Federal Trade Commission, the Interstate Commerce Commission and the Civil Aeronautics Board.

By expressly exempting stock held "solely for investment" from the operation of Section 7, Congress recog-

nized that stock ownership is not unlawful unless it carries with it the power adversely to affect competition. The decree here, which permits du Pont to retain only a limited interest in General Motors—the rights to receive dividends, to sell its stock, and to receive a proportionate share of General Motors' assets in the event of liquidation—leaves du Pont with less than the rights of an ordinary investor, who would normally be entitled to vote his stock.

The Government argues that du Pont would have an incentive to favor General Motors and to promote its interests so long as it owned any General Motors stock. But the Government abandoned that contention during the trial of the case on the merits, and this Court's decision that Section 7 had been violated made no mention of the possibility that du Pont might favor General Motors. Nothing in the record suggests that du Pont's relationship with General Motors has resulted or will result in its favoring General Motors in any respect which could bring about a substantial lessening of competition. In addition, the injunctive provisions which the District Court included in the decree in an abundance of caution, after commenting that the record did not warrant the granting of such relief, forbid du Pont from granting General Motors preferential treatment over its competitors. The Government cannot justify its claim for more drastic relief on the basis of conjecture as to conduct which it was never able to prove.

Nothing in the record or elsewhere supports the Government's theory that the officials of General Motors will be influenced in their decisions by the mere knowledge that 15% of the company's stock can be voted by the more than 200,000 widely-scattered du Pont stockholders. The factors which this Court believed might induce General Motors to favor du Pont did not result from any such

tenuous connection, but from the existence of conditions, all prohibited by the judgment here, which gave du Pont potential power in the management of General Motors' affairs. Indeed the Government's own plan of divestiture would have left the du Pont stockholders with voting rights similar to those which the Government now regards as impermissible and dangerous.

The Government is not correct in asserting that divestiture has always been ordered to remedy antitrust violations involving acquisitions. Divestiture has been ordered or not depending upon what was needed to provide effective relief in the particular case, and no court has held that other remedies could never be effective in cases involving illegal acquisitions.

II.

The District Court recognized that its "primary duty" was to devise "a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist" (R. 3196). The court considered the rights of innocent persons only insofar as it had "a choice among different remedial measures that will be equally effective to achieve the statutory purpose" (R. 3196). This was in accord with the principles which this Court has approved for the fashioning of antitrust relief, as the very cases cited by the Government specifically declare. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 78 (1911).

The public interest and the desirability that the relief be equitable, recognized by this Court in its mandate here and in those cases, require that where there is a choice between different effective remedies, the possible harm to innocent persons must be given weight. A court of equity should,

as did the District Court here, select the alternative which avoids inequity, injustice and unfairness to persons who have done no wrong.

This brief for General Motors will discuss only the adverse effect which divestiture would have on General Motors and its stockholders. The District Court found that a decree of divestiture would have a serious adverse effect upon the market value of General Motors stock, and therefore upon the General Motors stockholders. This finding was compelled by the evidence of record.

That evidence showed that if the original Government plan were adopted, the supply of General Motors stock on the market would be increased by the forced sales of almost two million shares per year for ten years, by sales for tax and other reasons by du Pont stockholders to whom approximately 4.4 million shares would be distributed annually, and by sales by other General Motors stockholders fearful that the market value of their investment would be depressed for a prolonged period. At the same time, adoption of such a plan would impair the prospects of appreciation in the price of General Motors stock, thus making that stock a less desirable investment and decreasing the demand for it, as both defense and Government witnesses recognized. The evidence demonstrated beyond question that forced divestiture such as the Government proposed below would seriously depress the price of General Motors stock for the full divestiture period. Investment bankers, whom even Government witnesses characterized as the persons with the "highest competence" in these matters (R. 1040, 787-788), estimated that the price would be depressed by 20%-30% (R. 2238, 1524-1525, 2084). Their estimates were supported by representatives of many large institutional investors, who testified that they would buy General Motors stock only at "bargain prices"

if the Government plan were adopted (R. 2174, 1841-1844, 1803, 1941, 2002).

For purposes of this case it is unnecessary to pinpoint the extent to which the market price would be depressed, for even a decline of only 10% from a price of $40 per share would cause a loss of more than $1,125,000,000 in the market value of General Motors stock. The many General Motors shareholders who would be unable to retain their stock for the full period of divestiture would suffer losses running into the hundreds of millions of dollars.

The additional selling of General Motors stock which divestiture would cause would also impair General Motors' ability to raise additional equity capital during the divestiture period, by making it more difficult (and thus more expensive) to underwrite additional issues of common stock, and by increasing the cost of such capital.

The Government attempted to show that divestiture would not adversely affect the market price of General Motors stock, by introducing evidence regarding several much smaller securities offerings issued under very different circumstances. The witness upon whom the Government now principally relies admitted, however, that the experience of those offerings would not afford any basis for a very definite prediction as to what would happen in the entirely different situation presented by this case.

The findings of the District Court, based upon the evidence as a whole, that forced divestiture would seriously depress the price of General Motors stock thus are fully supported by the record and are not "clearly erroneous." The Government tries to sidestep these findings by saying that they relate only to the plan which the Government proposed during the proceeding below. But that was the proposal on which the Government stood in the District

Court (R. 2292) and to which the evidence was principally directed. That plan presumably represented the Attorney General's best judgment as to what would be a fair and reasonable decree. Moreover, the record establishes that the variations of that plan referred to at the hearing—divestiture in one year, or in twenty years, or by the distribution of du Pont's General Motors stock in lieu of du Pont's normal cash dividend—would also have a substantial adverse effect upon the market price of General Motors stock.

The defendants had neither reason nor opportunity to disprove the new theories now advanced by the Government as to the feasibility of other methods of divestiture which are only tentatively and partially described in the Government brief, although General Motors is convinced that evidence would show that such methods either are impractical or would be equally harmful to innocent persons. To permit Government counsel now to argue that there are methods of divestiture which would not have such effects (an allegation which cannot be tested against proof), would be unjust to defendants and improper as a matter of procedure. Cf. *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947).

III.

Divestiture is not mandatory as a matter of law. Section 15, under which this case was brought, merely grants the district courts general equitable jurisdiction to prevent and restrain violations of the Clayton Act. This unconfined grant of jurisdiction is in the same words as Section 4 of the Sherman Act, which has long been interpreted as not requiring divestiture. It obviously grants the district courts broad discretion, and does not tie them to any particular form of relief. *Hecht Co.* v. *Bowles*, 321 U.S.

321, 329 (1944); *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). No cases have held to the contrary.

The Government argues that Section 7 makes the continued holding of the acquired stock illegal, and that the violation may be prevented only by divestiture. But this ignores the language of Section 7, which prohibits only those acquisitions likely to have restrictive effects on competition. It also ignores the language of this Court's mandate, which directed elimination of "the effects of the acquisition offensive to the statute," not of the acquisition itself. A violation of Section 7 consists of two ingredients—acquisition plus probable injurious effect on competition. If either is removed, the object of the statute will be achieved. Nothing in the statute compels a court of equity to attain this goal by the elimination of one factor rather than the other.

If the unlawful effect of an acquisition results from the exercise, or fear of the exercise, of power through the use of some incidents of stock ownership, such as voting rights or representation in management, the elimination of that unlawful effect through divestiture of those incidents of ownership can reasonably be deemed an appropriate remedy. Certainly nothing in Section 7 requires more. This interpretation of the section is supported by the action of the Department of Justice and the administrative agencies charged with the enforcement of Section 7, in consenting to or entering a number of orders which utilized remedies other than complete divestiture.

The Government relies on Section 11, which it says requires administrative agencies to order divestiture in all cases before them where Section 7 has been violated. Those agencies, however, have not construed Section 11 as commanding complete divestiture in all cases, and its

language does not so require. But, even more important, this action is brought under Section 15, not under Section 11. Nothing in the language or history of Section 11, which relates to the enforcement authority of the administrative agencies, in any way suggests that that section restricts the broad equitable powers of district courts acting under Section 15.

ARGUMENT

Introduction

Neither General Motors Corporation nor its stockholders, apart from du Pont, have been held to have violated any law.* Their concern with this proceeding at the present time stems from the tremendous harm to General Motors and its stockholders which would result from a decree of the sort which the Government seeks to impose. The evidence and findings demonstrate that adoption of the plan of divestiture presented by the Government to the court below, or any similar plan, would seriously depress the market value of General Motors stock for ten years, and would cause losses amounting to hundreds of millions of dollars to those General Motors shareholders who for any reason would not be able to retain their stock for the full divestiture period (pp. 64-87, *infra*). This Court, as much as the District

* Throughout the hearings on relief General Motors asserted that since it was not and could not have been charged with, and was not found to have engaged in, a violation of Section 7 of the Clayton Act by reason of du Pont's acquisition of its stock, the District Court had no power to issue any kind of an order, injunctive or otherwise, against it. Cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 634 (1953), where a similar point was left undecided. Nevertheless, in the belief that the District Court has formulated a decree which will not harm General Motors or its stockholders, General Motors has not appealed from the provisions of the decree applying to it.

Court, should adopt a remedy for the violation of Section 7 by du Pont which will "eliminate the effects of the acquisition offensive to the statute" in an equitable manner, so as to avoid injury of this magnitude to hundreds of thousands of persons not charged with having violated any law. As we shall show, the decree of the District Court achieves that result.

The Government's argument to the contrary disregards the terms of this Court's mandate, disregards the plan which the Government presented in the court below and to which the evidence was directed, and disregards all of the evidence which supports the District Court's findings. These matters are discussed preliminarily, so that the case may be considered in proper focus.

(a) The Government disregards the mandate of this Court.

The Government brief has ignored the words and content of this Court's mandate, which ordered the District Court to determine "the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute" (R. 2). This language does not even appear in the Government brief, which instead treats the decision of this Court as if it had ordered directly that du Pont's acquisition and continued holding of the General Motors stock be eliminated. The Government brief does not mention that the judgment of this Court is phrased in terms of eliminating the offensive *effects* of this acquisition, rather than the acquisition and holding of the stock itself.

(b) The Government disregards the principal issue upon which evidence was taken in the court below.

Although the hearing in the District Court related principally to the plan of divestiture proposed by the Govern-

ment, the Government, apparently realizing the weakness of its position in the light of the evidence, now makes little effort to support that plan. It argues, instead, that other methods of divestiture might be appropriate and less harmful, and its brief (p. 7) gives the impression that the Government was always willing to accept other plans of divestiture or modifications of its initial proposal. But this gives an inaccurate and misleading impression of the Government's position in the District Court and of what the defendants were called upon to meet.

The Government brief does not mention that when asked point-blank whether they intended to depart from their original proposal, Government counsel stated that that plan had been approved by the Attorney General, that trial counsel had "no authority to change" that decision (R. 2292), and that the Government was standing on the decree as originally proposed. See pp. 7-9, *supra*.

The District Court had ordered the filing of proposed decrees *before* the introduction of evidence so that the parties could direct their evidence to specific proposals and would not have to roam over a vague and unconfined area. Accordingly, thousands of pages of testimony were taken with respect to the harmful effects of the divestiture plan proposed by the Government. "A full exploration of facts is usually necessary in order properly to draw [an antitrust] decree." *Associated Press* v. *United States*, 326 U. S. 1, 22 (1945).

The Government's proposal undoubtedly represented the Attorney General's best judgment as to what would be a fair and reasonable decree. It would have been unreasonable to expect the defendants in the court below to establish, entirely apart from and beyond the Government's specific divestiture proposal, that no conceivable plan of divestiture would avoid serious harm to innocent persons.

It is equally unreasonable to expect this Court, without evidentiary foundation, to conclude that such a plan can somehow be devised. In *International Salt Co.* v. *United States*, 332 U. S. 392, 401 (1947), this Court stated that "The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us."

The Government should be required to adhere to the proposals on which evidence was presented below. This Court should not be asked, solely on the basis of statements by Government counsel unsupported by evidence, to modify the decree on the theory that there might be other methods of divestiture which would not have the same disastrous consequences as the plan proposed below. This is particularly so when the defendants had neither reason nor opportunity to disprove the claims now advanced by the Government as to the feasibility of these new and only partially described proposals. To permit Government counsel now to urge proposals which cannot be tested against proof would both be unjust to defendants and improper as a matter of procedure.*

(c) **The Government disregards most of the evidence of record and the findings reasonably based thereon.**

The evidence of record in this case would hardly be recognized from the description of it in the Government brief. The defendants' evidence as to the impact of divestiture on the price of General Motors stock is summarized inadequately in a single paragraph (Govt. br., pp. 18-19).

* We are not suggesting that the case should be remanded for the taking of further evidence. Since the judgment below fully complies with the mandate of this Court, it should be affirmed.

This gives the impression that the defendants' arguments are predicated largely on a single tax survey, that of National Analysts, Inc. Although the National Analysts survey was shown to be reliable, and by itself would have supplied an adequate basis for the District Court's findings, the record contains testimony of many other witnesses, completely independent of that survey, which supports those findings.

The Government treats the testimony of one of its witnesses and some of the supporting exhibits as if this were the sole reliable evidence on the question of market impact. Findings must, of course, be based upon the evidence as a whole. The Government brief disregards over a thousand pages of testimony, which the District Court reasonably believed, and which the Government challenges only by ignoring it.

The Government asserts (br. p. 64) that:

> "* * * The weakness in these findings [of the District Court] is that they were not based on divestiture itself, but on du Pont's evidence as to the results of the particular scheme for divestiture proposed by the Government."

For the Government to say that the findings were based upon the evidence* as to the results of the Government plan is merely to say that the findings were based upon the bulk of the evidence before the District Court on the issue which the Government was asking that court to try. This is a novel ground indeed for criticizing findings, or for suggesting that they have a "weakness" and therefore should not be heeded by this Court.

* The evidence relied upon was not merely du Pont's but also included that presented by the Government itself and by General Motors.

I.

THE DECREE COMPLIES WITH THE MANDATE OF THIS COURT

The fundamental question in this case, and indeed the only question, is whether the decree entered below carries out the mandate of this Court. The order was that

> "* * * this cause be, and the same is hereby, remanded to the United States District Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute in conformity with the opinion of this Court." (R. 2.)

It is significant that this mandate ordered the District Court to ascertain the relief necessary "to eliminate the *effects* of the acquisition offensive to the statute" (italics supplied). It was not an order to "eliminate * * * the acquisition", although the Government so treats it. As we shall show, the unlawful effects of a stock acquisition may be eliminated by remedies other than divestiture.

The question now, of course, is not whether another form of decree might also have been effective. Unless the Government can show that the decree formulated by the District Court cannot reasonably be expected to "eliminate the effects of the acquisition offensive to the statute", the existence of possible alternatives does not justify a reversal. The District Court was "clothed with large discretion" in selecting a judgment which fits the exigencies of the particular case (353 U. S. at 607-608; *International Salt Co.* v. *United States,* 332 U. S. 392, 400-401 (1947)).

A. The Decree Eliminates the Offensive Effects of the Acquisition.

In order to evaluate the action of the District Court, it

is necessary to ascertain the objectives which this Court directed it to accomplish.

This Court held that du Pont had violated Section 7 of the Clayton Act, because there was a reasonable probability that du Pont's use of its stock interest in General Motors might result in restraint or monopolization of the commerce in automotive finishes and fabrics. At the trial on the merits and in this Court, the Government spelled out the ways in which it contended that du Pont's ownership of General Motors stock had enabled it to influence the latter's purchasing policies. Du Pont officials had become the highest officers of General Motors.* There were a number of du Pont representatives on the General Motors board of directors and du Pont was consulted with respect to the nomination of others.** Du Pont representatives always constituted a majority on the committees which determined the bonuses for General Motors officials.†

These interlocking officials and directors were the avenues through which, according to the Government, du Pont's influence on General Motors was exerted. And these avenues were open because of du Pont's power to vote its stock. It was that voting power which placed du Pont representatives on the General Motors board and committees from the time of the original acquisition, and which gave these du Pont representatives a voice in the selection of General Motors officials and the determination of their bonuses. The Government emphasized that, while du Pont voted in a single block from 30-52% of the stock actually voted at General Motors stockholders' meetings, the remaining shares of General Motors stock were diffused among 436,000 shareholders.††

---

* (Brief for the United States, No. 3, 1956 Term, pp. 18-20.)
** *Id.*, at pp. 20-21.
† *Id.*, at p. 27.
†† (Brief for the United States, No. 3, 1956 Term, p. 28; see 353 U. S. at 607, n. 36.)

The decree of the court below strikes directly at those avenues of influence, which this Court indicated might result in the lessening of competition in the future by causing General Motors to favor du Pont as a source of supply.

The trial court concluded that if the means whereby du Pont's influence could be exercised were destroyed, the likelihood of influence would necessarily disappear (R. 3244-3245). Accordingly, its judgment deprives du Pont, and also Christiana and Delaware, of their right to vote General Motors stock (Article VI, R. 3304-3305). This disfranchisement extends to all the directors and officers of those companies and members of their families, and applies not merely to voting rights coming from du Pont but to all General Motors stock which any of them might own individually (Article VI, R. 3304). This disfranchises over two million more shares than would have been sold under the Government plan.* Moreover, these companies and persons are restrained "from attempting to influence, directly or indirectly, any person in any manner with respect to exercising rights" in any General Motors stock (Article VI, R. 3304).

Interlocking directorates between General Motors and the three du Pont corporations are prohibited. Indeed, the decree forbids officers, directors and even employees of du Pont, Christiana and Delaware from being directors or officers or employees of General Motors (Article IV, R. 3302-3303). In addition, the decree enjoins those three companies "from using or attempting to use, directly or indirectly, the stock ownership of du Pont or Christiana in

* Under the Government plan, 19,670,115 shares otherwise attributable to Christiana, Delaware and the stockholders of Delaware would have been sold (R. 3255; DPX 51, R. 2229, 3057), presumably to avoid any possibility that they might have a voice in the affairs of General Motors. The District Court's decree actually sterilized 21,676,576 shares (20,163,040 shares owned by du Pont, and 1,513,536 shares owned directly by the disfranchised persons, including Christiana). See First Report of Monitor to District Court, June 20, 1960, p. 20.

General Motors, to influence or control General Motors in any manner whatsoever" (Article III, R. 3302), or from nominating any person for election as a director or from proposing any person as an officer of General Motors (Article IV, R. 3302). And the other stockholders of du Pont who are entitled to vote General Motors stock are restrained from exercising the passed-through voting rights "in favor of the election of any person nominated or designated by, or held out in any way to be a representative of, du Pont." (Article VII, R. 3305.)

In short, the District Court has formulated a decree which eliminates every attribute of du Pont's stock ownership which might possibly be used to control or influence the decisions of General Motors management.

Furthermore, to make doubly sure that the decree would eliminate any lingering effects of du Pont's potential influence, the District Court included in Article V injunctions along the lines of those proposed by the Government, but "more drastic", so as to restrain General Motors and du Pont from "dealing with each other on a non-competitive or preferential basis" (R. 3257, 3250).* See pp. 16-17, *supra*.

In the unlikely event that the decree should prove inadequate to remedy the violation, a special provision permits any party to apply to the District Court for modification (Article IX, R. 3309-3310).** "This provision should

* Although these provisions were, in fact, an enlargement of similar less stringent proposals of the Government itself (cf. R. 16), the Government asserts that their inclusion in the decree was "a veiled recognition that merely restricting voting rights will not prove effective in terminating the violation" (br. pp. 50-51). The District Court, however, added them only after specifically stating that it was "not satisfied that injunctive provisions relating to trade of the character and scope proposed by the Government are necessary" (R. 3250).

** This provision is in addition to the standard retention of jurisdiction clause (Article XII, R. 3312), which permits modification of a decree in much more limited circumstances. *United States* v. *Swift & Co.*, 286 U.S. 106 (1932).

leave power in the court to enforce divestiture, if the injunction * * * [and the other provisions of the decree] fails." *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 604 (1951). As in that case, there is no reason to believe that there will not be "prompt and full compliance with the decree" (*ibid.*).

The District Court properly concluded (R. 3258):

> "* * * Without that voting power, and without directors on the General Motors Board, du Pont is completely stripped of any potential power to penalize or reward the employees of General Motors in accordance with their demonstrated attitude toward du Pont's products. In the absence of this voting power, lines of communication, suggestions, established relationships and other attributes of ownership of which the Government complained are rendered impotent. These all may represent ways and means by which du Pont's will could be brought to bear on General Motors, but each springs from the voting power attached to the General Motors stock which du Pont owns; absent that voting power, these means are capable of accomplishing nothing."

(R. 3245):

> "* * * General Motors would have no motive in these circumstances, arising either from fear of the exercise of the voting rights or resulting from the presence on its Board or on the committees of its Board of du Pont representatives or resulting from considerations of self-interest, to favor du Pont."

The Government argues that the injunctions against various types of trade relations "attack not the core of the violation but the results" (br., p. 51). These "results", however, are "effects offensive to the statute" of the sort this Court ordered eliminated. And the restrictions upon voting rights and interlocks unquestionably attack

"the core of the violation", for these attributes of stock ownership were the source of du Pont's potential influence over General Motors.

Authorities on the practices of corporations recognize that a stockholder exercises his power "through the right to vote" his stock.* If stockholders "have no voting power, their interest is ineffective";** there is no way by which it "can be transmitted into effectual action."† Berle and Means declare that "the direct manifestation of the shareholder's power" with respect to carrying on the business "was and is his right to vote."††

The conclusion that divestiture of voting rights and of representation on the board of directors and in management is sufficient to eliminate stockholders' power to influence corporate decisions and policies is in accord with the action of this and other courts and law enforcement agencies of the federal government.

In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 426 (1945), the district court had ordered four individual defendants with "substantial amounts of stock" in both Corning and Hartford "to divest themselves of their stock in the one or the other within two years." In view of the fact that "it may prove difficult for these defendants to comply within the period stated without severe loss", this Court held that a longer time should be allowed and "that an alternative provision would be appropriate depriving these

---

* Guthmann and Dougall, *Corporate Financial Policy* (3rd Ed., 1955), pp. 56-57.

** Gerstenberg, *Financial Organization and Management* (2nd Ed., 1948), pp. 107-108.

† Stevens, *Voting Rights of Capital Stock and Shareholders*, 11 Journal of Business of the University of Chicago 311, 343 (1938).

†† Berle and Means, *The Modern Corporation and Private Property* (1933), pp. 69-70, 138-139.

defendants of the right to vote the stock of one company or the other or to trustee the stock of one of the corporations if both stocks are held longer than the term fixed." The Court thus recognized that deprivation of voting rights would prevent stockholders from influencing corporate action as effectively as sale of the stock, and that where divestiture would cause "severe loss" (in that case to participants in the unlawful conspiracy), deprivation of voting rights could be allowed as an alternative. There is more reason for following this policy when, as here, the stockholders to be injured are completely innocent of wrongdoing.

Similarly, in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 400-401 (S.D.N.Y., 1957), affirmed 259 F. 2d 524 (C.A. 2, 1958), a private action in which Section 7 of the Clayton Act was found to have been violated by acquisition of a 23% stock interest, the District Court denied divestiture, but enjoined the defendant

> "from directly or indirectly voting any shares of stock of the plaintiff company which it may own or control, either directly or indirectly, at any meeting of plaintiff's stockholders, and from acquiring any direct or indirect representation on the board of directors of the plaintiff, and from acquiring additional stock of plaintiff."

The Department of Justice, the Federal Trade Commission, the Interstate Commerce Commission and the Civil Aeronautics Board have also accepted or approved orders which provided for disfranchisement rather than divestiture, as relief sufficient to eliminate the unlawful or improper effects of stock ownership. Certain of the decrees entered as a result of the decision in *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948), provided for the

separation of production and distribution from exhibition in the motion picture industry, but allowed controlling stockholders the option of selling their stock or depositing it with an independent trustee who would exercise the voting rights, although the stockholders would still receive the dividends. *United States* v. *Loew's, Inc.* (Warner Bros.), CCH Trade Cases, § 62,765 (S.D. N.Y., 1951); *United States* v. *Paramount Pictures* (RKO), CCH Trade Cases, § 62,335 (S.D. N.Y., 1948).* In *In the Matter of Union Bag and Paper Corp.*, 52 FTC 1278, 1292 (1956), a proceeding in which the Commission challenged a 9% stock interest as violating the Federal Trade Commission and Clayton Acts, the Commission found it sufficient to restrain any interlocking of officers or directors and the voting of the stock of the acquired company "for the purpose, or with the effect, • • • of substantially lessening competition or tending to create a monopoly."

The Interstate Commerce Commission has on a number of occasions held in Section 7 and other cases that divestiture was unnecessary where disfranchisement through the transfer of voting rights to independent trustees would deprive the acquiring company of any power to control the acquired company. *Chesapeake & Ohio Ry. Co. Purchase*, 261 ICC 239, 241, 243, 262 (1945), 271 ICC 5, 13, 43 (1948) (to avoid control, stock in other railroads to be voted by independent trustee and interlocking directors barred); *Wabash R. Co. Control*, 247 ICC 365, 372-373 (1941); *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 183 ICC 165 (1932); *New York, Chicago and St. Louis R. Co. Control*, 295 ICC 703, 718 (1958); *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 156 ICC 607

* A lower court modification of the RKO consent decree was reversed by this Court in *Hughes* v. *United States*, 342 U.S. 353 (1952).

(1929). Very recently the Civil Aeronautics Board approved a plan which would vest Hughes Tool Company's 78% of the stock of TWA in a voting trust in order to deprive the Tool Company and Howard Hughes of their power to control TWA. *In the Matter of the Applications of Hughes Tool Company and TWA, et al.*, Civil Aeronautics Board, Order No. E-16195, December 29, 1960.

Thus those cases, by holding disfranchisement of controlling stockholders sufficient to eliminate their control, support the action of the court below. Certainly the burden must be on the Government to demonstrate what avenues of influence are still open under the decree which it challenges. The Government has failed to meet that burden.

B. The Decree Leaves du Pont with No More Than an Investment Interest which Is Not Offensive to the Statute.

Significantly, the decree leaves du Pont with no more than an investment interest in the General Motors stock. Such a result is clearly permitted by Section 7 of the Clayton Act, which by its express terms does not apply to stock held "solely for investment" and not used "by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." As the District Court stated (R. 3246), this provision appears "to be a recognition on the part of Congress that the holding of stock does not in all instances carry with it the power to bring about consequences offensive to the statute."

The order of the District Court requires du Pont and Christiana each (Article III, R. 3301):

> "to divest itself of all rights and interest in the General Motors stock which each owns except bare legal title,

> the right to receive dividends, the right to participate in the distribution of assets upon dissolution * * *."*

Du Pont also retains the right to dispose of the stock (R. 3243), subject to approval of the court under certain circumstances.**

These are the rights which are of concern to a stockholder who regards his stock merely as an investment—although such a stockholder would also possess the voting rights which the decree denies to du Pont. These rights can not be used to restrain trade or lessen competition. "What would be left in du Pont would be the most sterile kind of an investment" (R. 3245).

This Court's statement that the original purchase was not made "solely for investment" (353 U. S. at 602) does not mean that the policy of the Act cannot be effectuated if in the future du Pont's rights in the stock are reduced to less than those of the ordinary investor, a status which Congress recognized as lawful and fully consistent with the statutory purpose. As the "investment" exception demonstrates, the object of Section 7 is to prevent the possibility of restraining effects upon competition, not to eliminate stock ownership *per se*. And this Court ordered only that "the *effects* of the acquisition offensive to the statute" be eliminated. A decree which leaves a stock

---

* They are also permitted to retain any rights or interests specifically reserved to them under the judgment, but there are no such rights or interests which affect the substantive issues here under consideration.

** Article VIII of the decree (R. 3309) provides that du Pont and Christiana can sell or otherwise dispose of all or any part of their General Motors stock, only if the Attorney General is first notified and the sale is approved by the District Court if he objects. Such notification will not be required for any single disposition of 50,000 shares or less, unless the number of shares to be disposed of plus the number disposed of in the preceding twelve month period exceeds 200,000 shares.

holder with rights which could not have produced those effects and which will not enable them to be continued is thus in entire accord with the statutory policy.

The Government says that it is inaccurate to characterize the interest which du Pont would retain as only a "bare legal title." This case is concerned with substance, not with terminology. The rights and interests retained would be of significance here only if they might be used to induce General Motors to favor du Pont as a supplier; it is obvious that they could not.

Whether or not du Pont turns over the dividends which it may receive on the General Motors stock to its stockholders, as it has done in the past and indicated it would continue to do (R. 3243), the receipt of those dividends *from* General Motors would not be a means whereby du Pont or its stockholders could influence General Motors. Du Pont's limited right to sell the General Motors stock would not enable it to retain any power over General Motors; indeed, the Government is urging that du Pont should be required to sell its General Motors stock. And the right to participate proportionately in the assets of General Motors in the unlikely event of liquidation would not enable du Pont to exercise any influence over General Motors in the foreseeable future.

C. The Government's Arguments that the Decree Does Not Comply with the Mandate Have No Basis in Fact.

The Government does not attempt to connect any of these rights retained by du Pont with the possibility of continued influence over General Motors. Instead it seeks to support its attack on the adequacy of the decree by asserting as fact matters of conjecture for which the record furnishes no support.

1. The Government first argues that so long as du Pont retains its stake in General Motors it would have an incentive to favor the latter (br., pp. 41-43). The Government originally alleged that this had occurred, but the point was abandoned even before the conclusion of the case on the merits in the trial court and was never mentioned in this Court or in the proceeding on relief.* This Court's decision plainly did not rest upon any findings that du Pont had favored or might favor General Motors. Indeed, the evidence during the trial on the merits showed that du Pont refused General Motors' request for preferential rights with respect to Duco, a new automobile finish, and gave General Electric, rather than General Motors, the first right to use Dulux, a new refrigerator finish (Transcript of Record, No. 3, 1956 Term, R. 2383-2385, 2405, 3917, 3919-3921, 3924, 3927, 3931, 3977).

The Government now, moreover, would go far beyond even its original allegations. It claims that the decree must prevent du Pont from favoring General Motors not only "in the area of supply of the specific automotive products on which this Court based its findings of violation of Section 7, but also on all the other business and financial re-

* As to this the District Court said (R. 3259): " • • • The Government does not suggest that there is any evidence that du Pont has favored General Motors over General Motors' competitors. Such a charge was made in the original complaint but was never proven and at the close of the trial in chief the Government did not even request the Court to make findings of fact that du Pont had so favored General Motors. Needless to say, therefore, such a charge was not before the Supreme Court and played no part in that Court's determination that du Pont's stock interest in General Motors might result in monopolization of General Motors purchases of automotive fabrics and finishes in violation of Section 7 of the Clayton Act. And it is to be noted that in the hearing on relief the Government did not offer any evidence that du Pont had favored, or was favoring, or was likely to favor, General Motors in any way whatsoever."

lationships or fields of possible competition between the two companies and between each of them and other chemical and automobile concerns" (br., p. 43). Section 7 only forbids relationships which may be used to bring about a "substantial lessening of competition." It is not shown in the record, and the Government does not assert, that any of the relationships to which it refers generally and without specification would have such an effect. Nor is it shown that du Pont could evade the decree actually entered by resort to favoritism in some of these other unspecified fields. This Court's prior decision was concerned only with the purchase of du Pont products by General Motors, with which the judgment below adequately deals.

The cases cited by the Government to the effect that relief may go beyond the limits of the proved violation (*United States* v. *United States Gypsum Co.*, 340 U. S. 76, 90 (1950); *International Salt Co.* v. *United States*, 332 U. S. 392, 400 (1947); *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409 (1945); see also *International Boxing Club* v. *United States*, 358 U. S. 242, 262 (1959)) do not mean that no relationship must be established between the violation and the need for additional relief. They hold merely that other means of achieving the unlawful end may be barred, particularly to a defendant who has shown a proclivity to violate the law.

A "decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion." *Local 167* v. *United States*, 291 U. S. 293, 299 (1934). Thus in *Gypsum* and *Boxing* relief was not limited to the exact area or commodity as to which violation had been found. And in *International Salt* another method whereby defendant could have forced users of its machines

to purchase its salt was blocked.* But "* * * the authority * * * to restrain the practice which it has found * * * to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 433, 436-437 (1941); *Communications Workers* v. *National Labor Relations Board*, 362 U. S. 479, 480, 481 (1960). In the *Hartford-Empire case* the Court eliminated a portion of the judgment which was "not * * * addressed to any practice indulged in or threatened by any of the appellants" (323 U. S. at 418). The paragraph in that case relied on by the Government, which says that a decree need not "deal only with the exact type of acts found to have been committed", also declared that the decree should not "enjoin 'all possible breaches of the law'" (323 U. S. at 409-410).

The injunctive provisions of the decree entered below already go far beyond the prohibition of the acts or effects which this Court held to be unlawful. The District Court expressly stated that it was "empowered to, and should, in appropriate circumstances, enjoin restrictive conduct even though there is no proof that the parties have actually engaged in that particular type of conduct," citing the *International Salt* case. (R. 3260). "Out of deference, therefore, to the Government's naked suggestion that du Pont might favor General Motors rather than on the basis of any proof that du Pont has favored General Motors, * * *" and in order "to forestall any trade favoritism of the kind which the Government has suggested but

* The defendant had forced licensees of its machines to buy its salt. The decree required it to license, lease or sell its machines on non-discriminatory terms, in order to prevent defendant from giving more favorable treatment to customers who would purchase salt from it (332 U. S. at 400, 402 n., 403).

not proven", the court included in the final judgment provisions prohibiting du Pont "from entering into preferential arrangements with General Motors and from offering any product or service to General Motors on terms and conditions more favorable than those offered to competitors of General Motors" (R. 3260; Article V, R. 3304). It should also be noted that the relief granted below, like that in *Gypsum* and *Boxing*, would preclude du Pont from exercising any influence upon General Motors with respect to sales of any du Pont products, not merely the automotive finishes and fabrics on which this Court's decision was based.

2. The Government argues that so long as General Motors knows that du Pont has the title to 23% of its stock, and that 15% can be voted by persons who also own du Pont stock, it will necessarily favor du Pont in the conduct of its day-to-day business (br., pp. 43-44).*

(a) The Government disclaims suggesting that the 200,000 or more stockholders of du Pont (R. 3245) who could vote General Motors shares would conspire or agree to vote their stock as a unit. (Brief for the United States in Opposition to Motions to Affirm, pp. 8-9.) Its position has always been that widely dispersed stockholders do not combine. In any event, the decree prevents the du Pont officers and directors from organizing or participating in any such combination; they are not themselves entitled to vote any General Motors stock and they are specifically enjoined "from attempting to influence, directly or indirectly, any person in any manner with respect to exer-

* Under the decree entered below 20,163,040 of the 63,000,000 General Motors shares owned by du Pont are disfranchised (First Report of Monitor, June 20, 1960, p. 20), leaving 42,836,960 shares which can be voted by du Pont's nondisfranchised stockholders. This represents 15.18% of the 282,260,998 General Motors shares outstanding as of December 31, 1958 (GX 691, R. 2634, 3007). See note, p. 32, *supra*.

cising voting rights in respect of any General Motors stock • • • " (Article VI, R. 3304). The decree also directs that the voting rights passed through to the du Pont stockholders "shall not be exercised in favor of the election of any person nominated or designated by, or held out in any way to be a representative of, du Pont." (Article VII, R. 3305.) In the unlikely event that this large and widespread group of stockholders tried to join, without du Pont leadership, in an effort to elect a director for the purpose of persuading or influencing General Motors to favor du Pont, they could only do so by means of an open and well-publicized effort.* If this were not in violation of the decree as it now stands, it could easily be halted by an application to the District Court.

The District Court, after giving careful consideration to the question whether there would be "any reasonable possibility that those shareholders or any part of them • • • could by voting cohesively or, as a group, influence General Motors to favor du Pont," found that (R. 3245):

> "• • • The Government has made no showing that any such possibility exists and there is no basis in the record on which the Court could assume that anything of the kind could happen. The number of stockholders, the diversity of their interests and the unlikelihood that General Motors trade policies could be influenced by actions taken at stockholders' meet-

* It is difficult to see how these 200,000 individual stockholders of du Pont could acquire the information which would enable them even to attempt to influence General Motors. They would have no way of knowing the extent to which General Motors was purchasing du Pont products. Nor would they even know each other's identity, knowledge which would be a prerequisite to their acting together. Information as to such matters could only be obtained from du Pont, and du Pont is enjoined from any action which might "directly or indirectly" influence any person with respect to the manner in which he might vote any General Motors stock (Article VI, R. 3304).

> ings militates against any such possibility. In addition the Court proposes, in a manner that will be stated hereafter, to provide by appropriate injunctive provisions against the remote possibility that the numerous stockholders of du Pont would nominate or elect a representative on the General Motors Board."

(b) What the Government argument comes down to is that the directors, officers and employees of General Motors will be influenced in their decisions by the knowledge that 15% of the company's stock can be voted by persons who are shareholders of, but are not otherwise connected with, du Pont, even though they will also know that there is nothing which those du Pont shareholders can do, by way of voting of stock or otherwise, to exert any pressure upon, or favor or penalize, either General Motors or its personnel. Here the influence which the Government conjures up would require that a hypothetical General Motors official believe that he may gain or suffer if he does or does not favor du Pont. There could be no rational basis for such a belief.

Nothing in the record or elsewhere supports this theory or provides any basis for a finding of probability that anything like this would happen. The factors which this Court believed might induce General Motors to favor du Pont did not result from any such tenuous connection, but from the existence of conditions, all prohibited by the judgment below, which gave du Pont potential power in the management of General Motors' affairs.

No such consequence was feared by the Government when it proposed its plan, under which the du Pont stockholders (other than Christiana, Delaware and the stockholders of Delaware) would have voted at the outset 23% (not merely 15%) of General Motors stock. See p. 5, *supra*. During the ten-year period of divestiture, title to

15.5%* would have been distributed to those stockholders and the remainder sold. Thus at the end of the period, du Pont shareholders would have owned and been able to vote 15.5% of the stock of General Motors, minus whatever they would have sold in the interim. Although some of this stock undoubtedly would have been sold, nevertheless, for purposes of the intangible and elusive, and perhaps subconscious, "influence" upon which the Government relies, it should not make much difference whether the shareholders of du Pont can vote 15% of General Motors' stock or somewhat less.

The Government also suggests that "practices and viewpoints developed" during the years of du Pont participation in General Motors management will be likely to continue (br., pp. 44-45). But neither the plan initially proposed by the Government nor any other decree of divestiture would be more effective in this connection than the judgment entered below, which blocks all the avenues whereby du Pont pressures or influence could be brought to bear on General Motors.

The Government argues (br., p. 45) that du Pont's "commanding position as a supplier of General Motors" has been "enhanced" since the close of the case on the merits, and implies that this demonstrates that du Pont influence has increased. It asserts that whereas General

---

* The du Pont stockholders entitled to vote under the decree approved by the court below are not precisely the same as those to whom the stock would have been distributed under the plan proposed by the Government. Under that plan, 43,865,385 shares, or 15.54% of General Motors' stock, would have been distributed to all du Pont stockholders except Christiana, Delaware and the stockholders of Delaware. Under the decree entered below, 42,836,960 shares, or 15.18%, may be voted by all du Pont shareholders except Christiana, Delaware and the directors and officers of du Pont, Christiana and Delaware and relatives residing in their households. See notes, pp. 32, 44, *supra*.

Motors' purchases from du Pont in 1947 were $27 million, for the years 1955-1957 they "averaged over $59,000,000" (*ibid.*). The averaging conceals the fact that General Motors' purchases from du Pont were steadily declining during this period,* and omits the amount for 1958, the last year of record, which was only $39,529,000 (GMX 20, R. 1979, 3121). Furthermore, the Government ignores the facts that both price levels and automobile production rose during this decade, and that in comparison with purchases from other suppliers, General Motors' purchases from du Pont declined. General Motors' purchases from du Pont decreased from 1.41% of General Motors' total purchases in 1947 to 0.95% in 1957 and 0.80% in 1958. (GMX 20, R. 1979, 3121.) Similarly, du Pont's sales to General Motors decreased from 3.45% of du Pont's total sales in 1947 to 2.70% in 1957. (Computed from GX 179, R. 909, 2752; GX 692, p. 38, R. 2634, not printed; 353 U. S. at 596.)

In short, although the Government argues generally that the decree fails to eliminate du Pont's power to influence General Motors management, it has not shown either that such influence could be exercised, or that du Pont's retention of a limited interest in General Motors could have any adverse effect on competition.

D. The Cases Relied on by the Government Do Not Establish that the Decree would be Ineffective.

The Government argues (br., pp. 47-49), on the basis of Securities and Exchange Commission decisions under the Public Utility Holding Company Act, that stock ownership may give rise to control notwithstanding divestment of voting rights. *In the Matter of H. M. Byllesby and Co.*,

---

* The actual amounts were $69,594,993 in 1955; $54,889,839 in 1956; $52,803,772 in 1957 (GMX 20, R. 1979, 3121; GX 179, R. 909, 2752).

6 SEC 639 (1940); *In the Matter of Manchester Gas Company*, 7 SEC 57 (1940); *In the Matter of The United Corporation*, 13 SEC 854 (1943). The circumstances of these cases show how different they are from the situation now before the Court. In each the facts warranted the Commission's conclusion that, despite a transfer of voting rights, the prior owner of the stock had continued or would continue to supervise the corporation as it had in the past. In the *Byllesby* and *United* cases the power to vote a single controlling block of stock could have been resumed by the prior owner at any time, and presumably this could have happened in the *Manchester* case if the preferred dividends had been paid.

Not only are such facts nonexistent here, but in none of those cases were the voting rights to be permanently disbursed to over 200,000 persons scattered throughout the United States and several foreign countries. Under the decree entered below du Pont will *never* be able to vote its General Motors shares; they will not be voted as a block in the future, but separately by du Pont stockholders; and du Pont's voice in General Motors management is barred by the prohibition against all interlocking directors, officers or employees and against efforts to "influence or control General Motors in any manner whatsoever." (Article III, R. 3302.) The question here is not whether under any conceivable circumstances power or influence can be exerted without voting rights, but whether this decree eliminates du Pont's power to influence General Motors.

The Government also relies upon *Continental Insurance Company* v. *United States*, 259 U. S. 156 (1922) as holding that adequate antitrust relief may require severance of interests other than voting rights in stock (Govt. br., pp. 49-50, 52-53). The district court's judgment in that case, entered after this Court's remand in *United States* v. *Reading Co.*, 253 U. S. 26 (1920), provided for separation of

a railroad company from a coal company. A $93,000,000 mortgage previously secured by the property of both was to be assumed by the railroad, but the coal company was to give the railroad $25,000,000 in bonds secured by a mortgage on the coal properties. This Court, on review, observed that each of the two companies would have a continuing interest in the solvency of the other in order to protect itself, and that this would give each an incentive to favor the other. (259 U. S. at 167-168.) The Court therefore ordered each company separately to assume its proportionate share of the mortgage.

In that case each corporate entity had a definite financial incentive to favor the other, irrespective of pressure or influence. But here General Motors would gain nothing by favoring du Pont. And, as we have pointed out, the charge that du Pont might favor General Motors has no basis in the record and is not properly in issue here. See pp. 41-42, *supra*. The *Continental* case thus has no relevance here. It certainly does not support the Government's theory that despite the absence of any financial or other incentive, General Motors will be induced to favor du Pont by the mere knowledge that 15% of its stock can be voted by du Pont shareholders.

The Government argues that divestiture has uniformly been found necessary to remedy Sherman Act violations founded on the acquisition and retention of stock in other companies (br., pp. 49, 35-36). For this it cites *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911), *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), *International Boxing Club* v. *United States*, 358 U.S. 242 (1959), and some of the older railroad cases.* But these cases neither hold

* *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904); *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61 (1912), 226 U.S. 470 (1913); *United States* v. *Reading Co.*, 253 U.S. 26 (1920); *United States* v. *Lehigh Valley R.R. Co.*, 254 U.S. 255 (1920).

nor say that other remedies may not be adequate where unlawful acquisitions are concerned. These were cases of deliberate monopolization, in which this Court had no occasion to, and did not, consider whether the kind of relief granted by the lower court here would be sufficient in a case such as this.

Nor is it true that divestiture has "uniformly" been found necessary in Sherman Act cases involving acquisitions. There have been many monopoly and combination cases in which divestiture was not found necessary.* As Judge Wyzanski said in *United States* v. *Minnesota Mining and Manufacturing Co.*, 96 F. Supp. 356, 358 (D. Mass., 1951):

> "• • • there is no specific requirement of any antitrust statute, or, indeed, of any case familiar to the Court, that dissolution and divestiture must always occur."

Each case turns "upon its own facts." *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 470, 474 (1913). In each case the issue is what remedy is needed if effective relief is to be granted.

---

* *United States* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 603 (1951); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 (N.D. Ohio, 1913), 217 Fed. 656 (N.D. Ohio, 1914), appeal dismissed on motion of United States, appellant, 245 U.S. 675 (1917); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 346-351 (D. Mass., 1953), affirmed 347 U.S. 521 (1954); *United States* v. *Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215, 244, 246 (S.D. N.Y., 1952); *United States* v. *Minnesota Mining and Manufacturing Co.*, 96 F. Supp. 356 (D. Mass., 1951); *United States* v. *American Can Co.*, 234 Fed. 1019, 1021 (D. Md., 1916), appeal dismissed on motion of United States, appellant, 256 U.S. 706 (1921); *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502, 519 (E.D. Pa., 1915), appeal dismissed on motion of United States, appellant, 257 U.S. 664 (1921). See also *Associated Press* v. *United States*, 326 U.S. 1, 25 (1945) (concurring opinion of Mr. Justice Douglas).

In the *Crescent* and *Boxing* cases, which the Government particularly stresses, the corporate defendants were controlled by a few individuals who were responsible for the unlawful conduct. In *Crescent*, where various affiliated exhibitor corporations controlled by three men (323 U.S. at 178) had combined to eliminate competition, it was obviously essential to the re-establishment of competition to require each corporation to stand independently. In the *Boxing* case, the same was true. The two persons, Norris and Wirtz, who controlled Madison Square Garden and arenas in other large cities and who had used their power deliberately to monopolize championship boxing bouts, were ordered to dispose of their stock in the Garden. The District Court had found that "dissolution of the combination can only be accomplished by an immediate and complete severance of the interlocking ownership of Norris and Wirtz in Madison Square Garden * * *" (358 U.S. at 258), and this Court affirmed.

In both the *Crescent* and *Boxing* cases, it may be noted, this Court sustained the manner in which the District Court had exercised its discretion. In neither case could competition have been re-established if the guilty individuals had been allowed to remain in control of the companies through which they had intentionally abused their power. In the instant case, however, the District Court has insured that none of the officials of du Pont will be able to exert any power with respect to General Motors.

The Government also contrasts the decree permitting du Pont shareholders to vote du Pont's General Motors stock so long as du Pont retains that stock with cases of complete divestiture, where the stockholders receiving the divested stock would in the normal course, by selling, gradually reduce the common ownership of the two stocks (br., p. 54). But in the circumstances of this case, where the

voting rights to only 15% of the stock are passed through to 200,000 different persons, there is no likelihood that those persons will have the power either individually or as a group to control or influence General Motors' policies, or that General Motors' officers will act as if such power existed.* So long as the decree is a reasonable means of insuring effective relief, it is immaterial that it differs from the remedies utilized in other cases where the courts were faced with different problems.

II.

THE DISTRICT COURT, IN FRAMING THE DECREE, PROPERLY CONSIDERED THE POSSIBLE CONSEQUENCES; THE FINDINGS THAT DIVESTITURE WOULD HARM INNOCENT PERSONS ARE FULLY SUPPORTED BY THE EVIDENCE.

A. The District Court Applied the Proper Standards in Framing Its Decree.

This Court's mandate directed "• • • a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute • • •" (R. 2).

* This case does not involve the problem of concentration of control which was present in the cases relied upon by the Government (br., pp. 53-55), where it was deemed inappropriate for the separated corporations to be controlled by the same stockholders. *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 470, 476 (1913) (68 persons would have owned 43% of the stock of both companies); *United States* v. *Aluminum Co.*, 91 F. Supp. 333, 394 (S.D. N.Y., 1950) (four families would have owned a majority of both Alcoa and Aluminium); *Continental Insurance Co.* v. *United States*, 259 U.S. 156 (1922) (two stockholders owned 42% of the stock of the Reading Co., the holding company which had owned all the stock of the railroad and coal companies whose separation this Court had ordered.) (Transcript of Record, No. 609, 1921 Term, p. 127); *United States* v. *Lehigh Valley R.R. Co.*, 254 U.S. 255 (1920) (50 stockholders would have owned 31% or more of the stock of both companies) (Transcript of Record, No. 1, 1920 Term, pp. 993-994).

That is exactly what the District Court did. It gave attention to the precepts of equity, and to the public interest, but it gave primacy to the need for elimination of the effects of the acquisition offensive to the statute.

The District Court recognized that its "primary duty" was to devise "a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist" (R. 3196). The effect upon the "interests of the many thousands of stockholders whose rights are directly involved" (R. 3197) was considered only insofar as the court had "a choice among different remedial measures that will be equally effective to achieve the statutory purposes" (R. 3196).

The Government, disregarding what the District Court said when dealing directly with the subject, argues that other statements of the District Court show that it "gave primacy to protection of the private interests of stockholders" (br., p. 57) rather than to the need for providing effective relief. But a few remarks taken out of context cannot overcome the District Court's repeated recognition throughout the opinion that its first duty was to prepare a decree which would eliminate the consequences condemned by the statute and by this Court. Thus, the Government attempts to support its position by quoting from the court's statement at the opening of the trial (R. 261), which was incorporated into the opinion (R. 3197), that:

> "The primary problems to be resolved through this trial is for the Court to promulgate a decree which will remedy the violation of Section 7 of the Clayton Act, without penalizing those who may become the innocent victims of this case, the stockholders and the beneficiaries in various trusts and institutions."

But the Government fails to quote the paragraph of the

opinion immediately following (R. 3198), where the District Court said:

> "This does not mean that the private interests of the stockholders can outweigh the public interest in a judgment that will effectively dissipate the effects of the acquisition found to be unlawful. But it does mean that in the opinion of this Court the *primary public purpose* should be achieved so far as possible without inflicting unnecessary injury upon innocent stockholders in the various corporations involved. The purpose of the judgment should be remedial and not punitive. *Hartford-Empire* v. *United States*, 326 U.S. 386, 409; *United States* v. *National Lead Co.*, 332 U.S. 319. No harsh and oppressive consequences should be visited upon the stockholders unless it can be shown on the facts that these results are inescapable if a decree is to be framed that will comply with the mandate of the Supreme Court. The cases leave no doubt that these are considerations which the Court should weigh in the framing of its final judgment. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185. Compare *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 604." (Italics supplied.)

See also R. 3196, 3199, 3210, 3211, 3246, 3247, 3249, 3252, 3260, 3262, 3263, 3264.* This, we submit, was an accurate

*For example:

"Accordingly, the problem before this Court is one of devising a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist.

"The primary duty of the Court is therefore clear. But in the performance of this duty, particularly as it may involve a choice among different remedial measures that will be equally effective to achieve the statutory purposes, there are certain other considerations that should not be ignored." (R. 3196.)

"Here again, however, the Court concludes that these facts do not in any way mitigate or qualify the duty of this Court to frame a decree that will effectively remove and guard

(Continued on next page)

statement of the principles which this Court itself follows in the fashioning of antitrust relief.

The Government objects to the fact that the District Court gave any weight at all to the impact which divestiture would have on innocent persons. But the District Court's consideration of this factor among others was consonant with the express language of the mandate and with the teachings of this Court. Certainly the language of the mandate, ordering the District Court to determine "the equitable relief necessary and appropriate in the public interest," suggests that the relief was to be fair and equitable in all respects, and that all public interests were to be considered.

The mandate thus comports with the classic statements in the cases cited by the Government (Br., p. 41) as to the criteria to be followed in fashioning antitrust relief. Of course, as the Government says (*ibid.*), quoting from *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911) and *Standard Oil Co.* v. *United States*, 221 U.S. 1, 78 (1911):

> "A court's paramount duty in framing an antitrust judgment is to impose prohibitions assuring 'complete and efficacious' relief, such as will 'neutralize the extension and continually operating force' of the defendant's violation."

But the passages relied upon by the Government do not stop

---

against the effects of the acquisition of the stock which have been held to be offensive to the statute." (R. 3199.)

"The question remains whether divestiture should be ordered even though it is not necessary in order to prevent the consequences condemned by the statute. It is in relation to this point that the Court is required to consider what the consequences of divestiture of the legal title would be to the shareholders of both du Pont and General Motors." (R. 3246-3247.)

with the language which the Government quotes. In the next sentence, the *Standard Oil* opinion points out (p. 78) that "one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." The *Tobacco* case, in the very sentence quoted by the Government, declares that "three dominant influences must guide our action" (221 U.S. at 185):

> "• • • 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, *the accomplishing of this result with as little injury as possible to the interest of the general public;* and, 3, *a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent* in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning." (Italics supplied.)

In the *Tobacco* case the Court refused to order injunctive relief which "might inflict infinite injury upon the public" or to direct the appointment of a receiver, because such relief "might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people" (221 U.S. at 187).*

These principles were recently applied by Judge Wyzanski in *United States* v. *Minnesota Mining and Manufacturing Co.*, 96 F. Supp. 356 (D. Mass., 1951), where, after he had ordered the Durex corporation to be dissolved, it was called to his attention that such a decree would increase the defendants' tax burden. Durex had partici-

* The remedies which the Court rejected in the *Tobacco* case would undoubtedly have been effective. One would have enjoined the defendants from engaging "in interstate commerce until the illegal situation be cured" (p. 186); the other would have directed the appointment of a receiver to take over and dispose of all of defendant's properties.

pated in the conspiracy through the holding and licensing of foreign patents. The court then modified its decree so as to permit Durex to remain undissolved so long as it was "limited to the purpose of holding * * * stock in subsidiaries located in" foreign countries (p. 357), saying:

> "The Court may withhold its hand in connection with dissolution in those cases where the anti-trust advantages are not sufficiently compelling to outweigh other disadvantages." (p. 358.)

Thus Durex was allowed to remain in existence because the powers by which it had violated the law had been removed. Similarly here du Pont has been permitted to retain some rights in its General Motors stock because those incidents of ownership which gave rise to the violation of Section 7 are eliminated.

As we have shown (pp. 54-56, *supra*), the District Court here considered the interests of innocent persons only in making a choice among remedies deemed to be "equally effective". The foregoing cases demonstrate, however, that it is proper for anti-trust courts sitting in equity to give weight to equitable interests other than that of law enforcement in choosing between remedies which might not be entirely equal in effectiveness. A district court should have discretion to adopt the remedy which will cause less harm to the innocent, so long as it will be reasonably certain to safeguard the public interest effectively and adequately. The *American Tobacco* case listed "three dominant influences," the first of which was "the duty of giving complete and efficacious effect to the prohibitions of the statute" (221 U.S. at 185). But the others also were "dominant influences" entitled to consideration in fashioning the decree. The opinion did not say that the other factors, which included regard for the interests of innocent persons, must be ignored and the remedy most certain to be fully effective invariably adopted—and the decisions themselves belie any such rule. See pp. 56-57, *supra*.

Courts do not proceed with "surgical ruthlessness" to obtain "absolute assurance" in this field of law, any more than elsewhere. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 348 (D. Mass., 1953), affirmed 347 U.S. 521 (1954). Society could be absolutely protected against recidivism by imposition of the death penalty in all criminal cases, but other social interests are deemed to outweigh the need for such absolute protection.

This does not mean that a decree should never contain provisions which may injure innocent persons, including stockholders. If effective relief cannot otherwise be obtained, the public interest in enforcement of the antitrust laws must prevail. However, as we have shown, the judgment entered below is fully effective to remove the offensive consequences of the acquisition.

The Government cites *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944); and *International Boxing Club* v. *United States*, 358 U. S. 242 (1959) (*supra*, pp. 50-52), as indicating that the financial losses of General Motors and du Pont shareholders should not be considered "where substitute remedies would not provide adequate protection to the public against violation" (br., pp. 55-56). But the judgment below does provide such protection (see pp. 30-40, *supra*). Furthermore, in *Crescent*, this Court said that "*Those who violate the Act* may not * * * avoid an undoing of their unlawful project on the plea of hardship or inconvenience." (Italics supplied) (p. 189). There was no showing in that case that the value of stock held by any *innocent* shareholder would be impaired by the decree.*

* The defendants were required to sell their interests in companies in which they owned 50% of the stock. These were small unlisted corporations, and it was not suggested in the defendants' briefs that this would diminish the value of the stock of the remaining shareholders. It was argued only that the amicable relationship that had existed between the non-defendant shareholders and the defendants would be jeopardized, if a "stranger should acquire either stock interest without the approval of the other stockholders." (See Brief for Defendants, Nos. 17-18, 1944 Term, pp. 123-124.)

In the *Boxing* case this Court properly disregarded the claim that *the two law violators* would suffer "great loss" as a result of the divestiture (358 U. S. at 256). Defendants' brief had also stated (pp. 31-32) that forced sale of the Norris and Wirtz stock "could [not would] depress * * * value of the stock of the other stockholders," but there was no evidence to support this assertion.* Indeed the only direct evidence on the subject appears to be that one of the other stockholders was willing to buy all of the Norris and Wirtz stock at slightly above the market price (Transcript of Record, No. 18, 1958 Term, pp. 826-827). The Court did not find it necessary to deal with this argument.

Thus neither *Crescent* nor *Boxing* involved any demonstrated harm to innocent stockholders, much less injury of the magnitude involved in the case at bar. And in neither was any alternative effective method of relief suggested, much less approved by the trial court.

Consideration of the harm which divestiture would cause to innocent persons is particularly appropriate in this case, where the magnitude of that harm is due in large part to the passage of thirty years between the original acquisition and the institution of suit. The growth of General Motors during this period and thereafter is not claimed

---

* The brief refers only to a resolution of the board of directors of the Madison Square Garden stating "that Mr. Norris was recognized as one of the most experienced promoters of professional boxing contests in this country; * * * that there was no one else in the organization who was qualified to carry on these boxing activities;" that Mr. Wirtz had also "rendered many valuable managerial services to the corporation; that the continued prosperity of the corporation depended upon the quality of its management and the ability of that management to secure attractions for the Garden which would be profitable," and that the corporation would "give up the promotion of championship boxing contests rather than lose the services of Messrs. Norris and Wirtz as officers and directors. * * *." (Transcript of Record No. 18, 1958 Term, pp. 1583-1584.)

to be attributable in any way to du Pont's holding of General Motors stock, or to du Pont's policies with respect to its sales of finishes and fabrics to General Motors. The hundreds of thousands of persons who purchased General Motors stock during this time (GMX 15, 16, R. 1976, 3117, 3118A) had no reason to foresee that the value of their investment might be reduced for a long period because of a 1949 challenge to the validity of du Pont's 1917 and 1919 acquisitions.

The "public interest" and the desirability that the relief be equitable, recognized in the *Standard Oil* and *Tobacco* cases and in this Court's mandate here, require that where there is a choice between different effective remedies, the effects upon the property rights of innocent persons must be given weight. A court of equity should, as did the District Court here, select the alternative which avoids inequity, injustice and unfairness to persons who have done no wrong.

B. The Evidence Supports, and in Fact Compels, the District Court's Findings as to the Harmful Consequences of Divestiture.

The trial court found that a decree of divestiture would have "very serious adverse consequences • • • to innocent stockholders" (R. 3247). These include the "adverse consequences on the market value of both General Motors and du Pont stock" and the tax consequences to the du Pont shareholders (R. 3247). The District Court's findings of fact are binding unless "clearly erroneous". Rule 52 (a), Federal Rules of Civil Procedure. Here the findings not only are supported but are compelled by the evidence of record.

The Government does not assert that the findings as to the tax consequences of its basic plan are wrong; its posi-

tion is that the District Court erred in considering this subject at all.

And even as to the deleterious effect of divestiture upon the market price of General Motors stock, the Government does not assert that the findings are "clearly erroneous". It goes no further than to say that it does "not agree" (br., p. 64) with the District Court's appraisal of the results of the Government plan. This is in substance a concession that the findings are not clearly erroneous, which under Rule 52(a) means that the reviewing court must accept them.

The Government tries to sidestep the findings by arguing that they relate only to the plan which it proposed below, and that du Pont should be able to devise some undescribed method of divestiture which would not have such consequences, even though the Attorney General was not able to do so during the long period in which the case was before the District Court. Suggestions are offered, some of which were brought to the attention of the court below and some of which were not.

We have already shown that the Government cannot, at this stage of the case, properly shift its position to advocate proposals as to which no evidence was introduced, after refusing at the hearing below to modify the plan which it had initially submitted. (See pp. 26-28, *supra*.) Even more clearly, the Government cannot reasonably assert that the findings are "based on mistaken assumptions" or fallacious reasoning (br., pp. 26-27) because they were restricted to the principal issue presented during the trial.

In any event, as will be apparent from the ensuing discussion, the consequences of any program of forced divestiture would be similar in nature, though possibly somewhat different in degree, because the courts can neither

amend the tax laws nor repeal the economic law of supply and demand.

None of the evidence in the court below indicated that there is any feasible method of divestiture which would avoid or eliminate the harsh consequences of the Government plan.* The testimony about variations of that plan led the court to conclude that, "the modifications of the Government's plan which were discussed in the hearing would not, in the opinion of the Court, remove these adverse consequences * * * *" (R. 3248). See pp. 13-14, *supra*.

This brief for General Motors will discuss only the adverse effect which divestiture would have on General Motors and its stockholders, and will leave to others the treatment of the tax burden which would be imposed on the stockholders of du Pont and the market impact which divestiture would have on the price of du Pont stock. Necessarily, it will deal with the evidence as to the effects of the decree proposed by the Government in the District Court, for, in view of the Government's position there, that was the issue to which the evidence principally related. We also show, however, so far as the record permits, that the additional "suggestions" now advanced in the Govern-

*We ignore, as does the Government, the vague, conclusory testimony of two Government witnesses, Dr. Boni and Professor Howell, of whom the trial court said:

"In particular, the Court was not persuaded by the testimony of Mr. Boni or Mr. Howell. The statistical tables from which the former drew his conclusions were prepared in a loose manner which could hardly be said to comply with accepted standard of statistical approach. His demeanor on the stand and his inability to give specific answers to the questions addressed to him left the Court with the conclusion that little or no reliance could be placed on his expert opinion. The opinions which Mr. Howell expressed in the course of the Government's rebuttal were completely unsupported by any evidence that he had studied the issues before the Court. While he stated those opinions freely, in view of their lack of foundation the Court cannot attach any weight to them." (R. 3218.)

ment brief, to the extent that they relate to General Motors, do not provide reasonable or feasible alternatives. See note, p. 44, *supra*, and pp. 67, 84, *infra*.

Divestiture would seriously injure General Motors and its stockholders by depressing the price of General Motors stock. Stock prices, like the prices of all commodities sold in free markets, result from the interaction of supply and demand. When demand exceeds supply, price increases until additional supply enters the market to balance the equation; conversely, when supply exceeds demand, additional purchasers can be attracted only at a lower price. Any plan of divestiture would greatly increase the supply of General Motors stock on the market. It would not increase the demand for that stock one iota, but on the contrary would decrease demand by making the stock much less desirable as an investment. New demand sufficient to absorb that additional supply could be created only by a substantial reduction in price.

The Government brief, read as a whole, does not seem to argue that divestiture would not adversely affect the market value of General Motors stock. It tries to minimize that effect, however, by characterizing it with weaker adjectives[•] than did the trial court or the witnesses credited by that court. But the trial court's findings as to market impact, though ample to support the judgment, understate the evidence.

[•] Br., p. 13: "• • • without *serious* injury • • •"
Br., p. 26: "• • • will not cause *undue* financial losses • • •"
Br., p. 59: "• • • without *undue* financial loss • • •"
Br., p. 59: "• • • losses • • • can be *minimized* • • •"
Br., p. 73: "• • • without *appreciable* or *significant* effect • • •"
Br., p. 75: "• • • without *material* adverse effect • • •"
Br., p. 75: "• • • without *material* impairment • • •"
But cf. br., p. 55: "• • • we do not believe that divestiture of the General Motors stock by du Pont need impose any financial loss on the stockholders of either du Pont or General Motors • • •"
(Italics supplied.)

1. **Divestiture would substantially increase the available supply of General Motors stock.**

The Government does not and cannot deny that the plan which it proposed, or any plan of divestiture, would substantially increase the supply of General Motors stock on the market. However, a full appreciation of the extent of that increase in supply can be gained only from a careful study of the Government plan. Under its terms, 19,670,115 shares of General Motors stock would be sold over a ten-year period, and 43,865,385 shares would be distributed over the same period as taxable dividends to the stockholders of du Pont other than Christiana, Delaware, and the stockholders of Delaware. See p. 5, *supra*.

The annual forced sales of almost 2,000,000 shares, continuing for ten consecutive years, would be a fixed, known increase in the supply of General Motors stock.*

* The Government refers to the provision in its plan which would permit the trustee to apply for an order postponing one of the annual sales (with court approval) if he believed that he could not sell the stock within the one-year period at prices reflecting its "fair value and true worth" (R. 15; see Govt. br., p. 9). This ignores the requirement in the Government plan that complete divestiture be accomplished within ten years (R. 15). The testimony was that any such postponements would compound the market impact by piling up the number of shares to be sold later in the ten-year period (R. 1524, 1568). Commenting on this provision, the District Judge said (R. 3240-3241):

> "However, it was testified that the trustee could never realize during the ten-year period a price sufficiently high to reflect the fair value and true worth of the stock. Accordingly, this provision would make the Government proposed decree a virtual nullity unless the intent is that, at the end of the ten-year period, the trustee shall dump all of the approximately 20 million shares of General Motors then belonging to Christiana, Delaware and the stockholders of Delaware on the market at any price. The latter would not be a sensible proposal. However, the provision does indicate that the Government concedes that these shareholders of du Pont should not be penalized and should receive the fair value and true worth of the General Motors stock. The mechanics of accomplishing this desirable objective are simply faulty."

But the trustee's sales would be only one of several factors increasing the available supply of General Motors stock if the Government plan were adopted. Another significant source of supply would be the du Pont stockholders to whom almost 44 million shares of General Motors stock would be distributed as a taxable dividend. Many of them would sell the distributed stock in order to obtain money with which to pay the additional income taxes and for living expenses.*

Such sales of course would not be limited to those in the highest tax brackets; nonetheless the example of the high-bracket taxpayer most graphically illustrates why there would be a substantial amount of tax selling. Mr. Sumner B. Emerson, a partner in Morgan, Stanley & Company, calculated upon the basis of a statistical analysis in the record (DPX 25, R. 1378, not printed) that in the top bracket of du Pont stockholders, those holding over 5,000 shares, the mean annual distribution of General Motors stock would be 1,787 shares valued at $82,202 (at $46 per share); that the average person in that bracket would pay a tax of $65,700 on this amount; that the average income available to such a person (before taxes) would be in the range of $160,000 to $180,000 and,

> "If your take off the normal tax on that income, he has left to live on now, before any General Motors distribution is made, approximately $60,000; * * * in other words, the increased taxes [on the distribution of General Motors stock] would use up either nearly every cent that he has to live on or more than what he

* A number of expert witnesses testified that such sales would occur (Emerson, R. 1485-1492; Beacom, R. 1653; Jocoby, R. 1732-1734; Moses, R. 2007-2008; Lenz, R. 2073-2074; Kennedy, R. 2176; Forgan, R. 2233-2234), and many of the du Pont stockholders who testified at the hearing on relief indicated that they would sell the stock distributed to them if the Government plan were adopted (Christensen, R. 1415-1416; Moran, R. 1423-1424; Schwenke, R. 1438; Peter, R. 1458; Turner, R. 1461; Babbitt, R. 1465; Marschak, R. 1472).

has to live on, depending on how you evaluate General Motors at the time. So it is perfectly obvious that people in that bracket have got to sell something to raise those taxes.

Now to be sure they could sell anything—the natural thing for them to sell is the security that caused the extra tax. We think a lot of them would therefore sell General Motors." (R. 1487-1488.)

Mr. Emerson's example was based upon the assumption that the stock distributions would be in addition to du Pont's normal cash dividend. The Government suggests (br., pp. 67-68) that the income tax burden imposed on the du Pont stockholders would be mitigated if du Pont instead substituted its General Motors stock for a part of its normal cash dividend. But many witnesses testified that such a plan would greatly increase the volume of sales of General Motors stock by du Pont stockholders, because it would reduce the amount of cash which they had hitherto received and on which many of them relied for payment of living expenses, taxes and the like (Emerson, R. 1537-1538, 1542-1543; Jacoby, R. 1717-1719; Caley, R. 1806-1807; Moses, R. 2010-2011; Lenz, R. 2085-2086). Consequently, as the District Judge found (R. 3247-3248), although the tax burden imposed on the du Pont stockholders might be reduced, the depressant effect on the market price of General Motors stock would be substantially increased. It would be unjust to relieve the burden on du Pont's stockholders at the expense of the stockholders of General Motors.*

* Such a plan has other obvious flaws. At the rate suggested by the Government (1,150,000 shares annually, which would amount to slightly over one-sixth of du Pont's "normal" dividend), divestiture in this manner would take 55 years. Furthermore, such a distribution would result in the accumulation of literally billions of dollars in du Pont's treasury (DPX 39, R. 1925, 3046A)—a sum which du Pont would find it impossible to invest in its own business (R. 1921) and which, if invested in the stocks of other companies, would create additional antitrust problems (R. 1922).

Although some du Pont stockholders needing cash might liquidate other investments, most of them undoubtedly would sell the distributed General Motors stock. Mr. David M. Kennedy, Chairman of the Board of the Continental Illinois National Bank and Trust Company of Chicago, agreed with Mr. Emerson that there is a likelihood that one who receives stock as a taxable dividend would sell that stock rather than other stocks in order to obtain cash to pay taxes and for other needs (R. 2176, 2196-2197). These witnesses pointed out that disposition of other investments usually would involve capital gain problems, whereas the distributed stock could be sold with little or no capital gain or loss* (R. 1488, 2176, 2196). Moreover, many distributees who needed cash, knowing that adoption of the Government plan would have a prolonged depressing effect on the market value of General Motors stock, would undoubtedly sell that stock rather than liquidate more desirable investments. Although it is impossible to predict exactly the amount of General Motors stock which would be sold by du Pont stockholders needing or wanting cash, several highly qualified witnesses testified that it would be a minimum of 1,000,000 shares per year (Emerson, R. 1489-1491; Jacoby, R. 1733-1734; Lenz, R. 2073-2074; Forgan, R. 2233-2234).

In addition to those who would sell to obtain cash, many du Pont stockholders would be motivated by other factors to dispose of the distributed General Motors stock.** A prominent economist and two representatives of large institutional investors testified that some of those stockholders would sell in order to maintain the desired balance and

---

* The tax basis of the stock distributed to individuals would be its market value at the date of distribution, which would usually be only shortly before the date of sale.

** This fact is recognized, in another context, at p. 54 of the Government brief.

diversification in their investment portfolios (Jacoby, R. 1732; Herd, R. 1838-1839, 1842-1843; Moses, R. 2007). Others might regard General Motors stock as unsuitable for their investment programs (Moses, R. 2008). Many investors not presently owning General Motors stock would be unwilling to retain the small amounts distributed to them as du Pont stockholders (Emerson, R. 1489; Caley, R. 1803; see also DPX 36, R. 1549, 3043-3044). Furthermore, representatives of two leading banks testified that in many cases trusts holding du Pont stock would sell the distributed General Motors stock to facilitate the division of trust income among several beneficiaries (Beacon, R. 1653; Lowell, R. 1940-1941).

In attempting to predict the increase in the available supply of General Motors stock which would result from adoption of the Government plan, we have thus far considered only the annual forced sales by the trustee and the sales of distributed stock by du Pont stockholders. In addition, many present General Motors shareholders who are interested, as many investors are, in the value of their investments and not merely the income therefrom, also would dispose of their holdings if the Government's proposed decree were adopted. They would be motivated by the knowledge that the price of General Motors stock would either decline or fall behind the rest of the market, and accordingly would sell in order to reinvest their funds in stocks with better prospects for capital appreciation. Since almost 220,000,000 shares of General Motors stock are owned by stockholders other than du Pont and Christiana, such sales could have an overwhelming effect on the available supply of General Motors stock.

Mr. Winthrop Lenz, Vice President of Merrill Lynch, Pierce, Fenner & Smith, Inc. (the largest security commission firm in the United States (R. 2063)), testified that if the proposed decree were adopted, his firm would remove

General Motors from its list of stocks "preferred for purchase" (which list is circulated to approximately 425,000 people) (R. 2080-2081); and would, if asked, advise its customers to dispose of their General Motors holdings unless they were prepared to "go through a prolonged period of adverse price action" (R. 2077). He thought that "most of them would undoubtedly sell * * *" (R. 2165).* He described the impact such sales might have upon the market as follows:

> "I believe that the problem of the existing General Motors shareholders may be the most difficult problem involved in the Government proposal. There are hundreds of thousands of shareholders owning over 218 million shares that are not involved directly in the Government proposal, but who will be very badly hurt, in my judgment, by the proposal if it is put into effect.
>
> * * *
>
> "I might add one other thing, Mr. Horsky. We are talking about 218 million shares here. If only one per cent of these stockholders, not in numbers, but in number of shares, decides to sell, we have another two million shares [on the market]. If two per cent, four million shares.
>
> "I do not know what the effects of such selling would be, but add it to the sales on the block basis, and the disorganized sales from the holders who get the distributions, the impact would probably be far greater than any figures that I could calculate." (R. 2076-2077.)

Mr. J. Russell Forgan, senior partner in the investment banking firm of Glore, Forgan & Co., testified that adop-

---

* On cross-examination, Mr. Lenz stated (R. 2165):

> "Then, if the customer asked us what our opinion would be, we would tell him that we thought he should sell the stock unless he could withstand a prolonged price decline without any qualms on his part, and most people do not like to lose money, or lose part of their profits, so my presumption is that most of them would undoubtedly sell their stock."

tion of the Government plan would result in additional sales of General Motors stock because of "fear and confusion" (R. 2234); discussing such sales, he said (R. 2234):

> "I am of the opinion that a great many of the smaller stockholders and the less well informed stockholders would sell simply because they didn't understand the situation and were afraid of it and would rather reinvest the proceeds in a more stable stock where they didn't have these questions overhanging the market."

Moreover, the impact of sales by present General Motors stockholders and by du Pont stockholders receiving distributions of General Motors stock cannot be evaluated solely by reference to the volume of such sales. Those persons would be acting without guidance or organization, since there would be no practical method of forming a large secondary selling group to handle their sales (Moses, R. 2041; Lenz, R. 2075-2076). Each individual seller would attempt to dispose of his holdings as quickly as possible in order to minimize losses, thus deluging the already glutted market for General Motors stock. Because such sales would be disorganized, their impact on the market would necessarily be far greater than that of an underwritten offering of comparable size (Friend, R. 1027, 1036, 1037; Emerson, R. 1491, 1608; Lenz, R. 2074-2076; Moses, R. 2006-2008, 2041).

In sum, adoption of the Government plan would result in a substantial increase in the available supply of General Motors stock: almost 2,000,000 shares would be disposed of annually by the trustee, at least 1,000,000 shares would be sold annually by du Pont stockholders to obtain cash with which to pay taxes and living expenses, and an indeterminate, but probably very substantial, number of additional shares would be sold by du Pont and General Motors stockholders motivated by the various other factors discussed

supra, pp. 68-71. The probable impact of those sales is most apparent when the amounts are compared with the present volume of trading in General Motors stock, i.e., with the supply which has been available for sale at prevailing prices.* The average annual volume of General Motors stock traded (on the New York Stock Exchange and seven regional securities exchanges) has been approximately 9 million shares in recent years (DPX 52, R. 2229, 3058). Thus the additional sales resulting from adoption of the Government plan would cause at least a 33 to 40 per cent increase in the supply of General Motors stock on the market, and if any substantial number of existing stockholders was influenced to sell, the increase would be a great deal larger.

2. **Forced divestiture would reduce the demand for General Motors stock, and new demand sufficient to absorb the additional supply would arise only at substantially lower prices.**

Although the Government plan would compel the sale of two million shares of General Motors stock annually for ten years and would cause the sale of millions more, that plan would neither compel nor cause the purchase of even one additional share. On the contrary, Government witnesses as well as defense witnesses testified that adoption of such a decree would actually decrease the demand for General Motors stock. Potential buyers would be deterred by the same factors which would induce present stockholders to sell their stock—the cloud of uncertainty surrounding General Motors stock, and the virtual elimination

* Mr. Emerson testified that in predicting the effect which a particular stock offering will have on price, one of the most significant factors to be considered is the relative size of the offering as compared to the normal volume of trading in that stock (R. 741-742). Unlike Dr. Friend (R. 1045, 1055-1056), Mr. Emerson testified that this comparison is more important than a comparison of the size of the offering to the total of the company's outstanding stock (*ibid.*). Mr. Kennedy also was of the view that a comparison of the volume of forced sales to the outstanding equity of General Motors would not "have much influence" in determining the probable impact of divestiture in this case (R. 2216-2217).

of prospects for substantial appreciation in its price. At the same time, existing demand for that stock would be partially satisfied by the distribution of almost 44 million shares to du Pont stockholders, including institutional investors, many of whom might otherwise be prospective purchasers.

In spite of these limitations on demand, no one doubts that the additional supply of General Motors stock forced onto the market as a result of the Government plan could be sold if the price were low enough. The only unanswered question is: How low must that price be?

Although the very nature of that question precludes the formulation of a precise answer, the testimony at the hearing on relief proved beyond any doubt that the price would have to be considerably below that which would otherwise prevail. Only a substantially lower price could generate *new* demand sufficient to absorb the additional General Motors stock which would be forced onto the market if the Government plan were adopted.*

---

* The option which Article VII of the Government plan (R. 14-15) would grant to other du Pont stockholders to purchase the General Motors stock allocable to Christiana, Delaware and the stockholders of Delaware would not create additional demand. The District Court recognized that such a provision is meaningless (R. 3239-3240):

"* * * There is no specification regarding the price at which the shares may be purchased under such option or rights. It would seem that the price would have to be the market price in order that there be no unjustified taking of property from Christiana and Delaware and giving it to other stockholders of du Pont. But, if it is the market price, there would be no incentive to such other stockholders to purchase the shares since they receive many such shares as dividends and know that the trustee must make a general offering of General Motors shares and that the market price will be further depressed. Accordingly, it appears to the Court that the provision is without substance. It is apparently inserted to give the appearance that the offering by the trustee is similar to a rights offering by a corporation to its own stockholders. There is no such similarity."

(*Continued on next page*)

The necessary new demand could come only from institutional investors—insurance companies, trusts, pension funds and investment companies. Mr. Forgan, a leading investment banker, when asked where he would seek "the demand necessary to take up this increased supply of stock to be offered under the decree," replied:

> "Well, I would know that the only place that you could find that increased demand is through institutional buying." (R. 2237.)

Most of the witnesses called by the Government testified about the growth of institutional investment in common stocks,* and the Government introduced numerous exhibits on that subject. This evidence, however, proved only that institutional investors generally may be expected to purchase more common stock in the future, not that they will buy any particular stock in any definite quantity at any particular price.** That there is no predictable relationship between the demand for common stock generally and the demand for any one stock is demonstrated by the fact that institutional investment in General Motors stock declined in 1958 (the last year of record) (GMX 26, R. 1986, 3126), al-

---

The Government now indicates (br., p. 9, n. 5) that the option price would be the market price, but, as Mr. Forgan testified (R. 2239), "an option [to purchase] at the market price of the stock is obviously worth nothing." Messrs. Emerson (R. 1496-1497) and Forgan (R. 2239-2240) agreed that such a provision would not alleviate the market impact of the Government plan.

* 17 of the 21 witnesses called during the Government's case in chief testified on direct examination regarding institutional investment in common stocks.

** Mr. Vito Natrella, one of the principal Government witnesses on the subject of institutional investment, admitted that his projections were not intended "to convey any significance with respect to the question whether at any time in the future a particular institution will buy the stock of a particular company at a particular price." (R. 725.)

though institutional investment in common stocks generally was increasing at that time (Securities and Exchange Commission Statistical Series, Release No. 1680, May 31, 1960, Table 4).

Any increased institutional demand for common stocks would be a factor in the market whether or not the Government plan were adopted; it would not constitute new demand to offset the additional supply of General Motors stock which the Government plan would force onto the market. In short, there is no evidence in the record that institutional investors would absorb the increased supply of General Motors stock regardless of price; on the contrary, the record clearly shows that only a sharp decline in price could produce new demand adequate to absorb that new supply.

Mr. Forgan, who is accustomed to risking large amounts of his own capital in the underwriting of great blocks of securities, testified that if the Government plan were adopted new institutional demand for General Motors stock could be generated only by a substantial reduction in the price of that stock:

"Q. How would you go about generating demand from that type of buyer [institutional investors]?

"A. There is only one way I know how to do it, and that is through price, making it low enough and cheap enough so the buyers will come in.

"Q. Why do you stress price?

"A. Because that is the only mechanism I know to take care of this huge supply of stock which is coming on the market. There isn't any other mechanism I know of that will take care of it.

"Q. Would there be any tendency upon the part of the institutional investor to wait, as Mr. Kennedy testified here?

"A. Yes, very definitely so. As Mr. Kennedy said, he doesn't have to buy General Motors and if he knew, which he will know, of course, that every year for ten years he is going to have an opportunity to step up on a secondary and buy his portion of 2 million shares [from the trustee], I don't think he would be in any hurry to buy unless he felt that the price was a rock-bottom bargain basement price. Certainly the first issue or the first few issues would have to be at that. If he has a flop there, then the trustee would be in trouble with future issues." (R. 2237-2238.)

Mr. Forgan's conclusions were substantiated by the testimony of several representatives of major institutional investors, who are extremely sensitive to the relative attractiveness of alternative investment opportunities. Those witnesses agreed that if the Government plan were adopted their institutions would purchase General Motors stock only if it could be obtained at an unusually low price, because the resultant increase in the supply of that stock would minimize the prospect of appreciation in its price.

Mr. Kennedy of the Continental Illinois Bank pointed out that if the Government plan were adopted General Motors stock would be desirable only as an income-producing security, rather than as an investment with prospects for capital appreciation. Mr. Kennedy's bank, which no doubt is typical of most large banks, generally invests trust assets in securities having a "good possibility of capital appreciation", and therefore would purchase General Motors stock only at a "bargain basis", which he described as "a price at which it would yield 6 per cent or more" ($33, assuming maintenance of the present $2 annual dividend) (R. 2173-2174). Discussing the effect of the Government plan on his bank's probable course of action with respect to General Motors stock, Mr. Kennedy went on to say (R. 2174):

"Q. Might the bank defer its purchases of General

Motors stock even if the price of the stock fell to $33.00 per share?

"A. Yes, we might well defer our purchasing, waiting to see what the actual effect of these annual sales of this General Motors stock would be in the market.

"We are not required to purchase General Motors stock. We have other alternative outlets for our money, and we could take refuge for temporary or longer periods as might be necessary in Treasury bills or other obligations, or we can seek other investment outlets in the market.

"Q. Would the policy that you have just expressed be applicable to pension trusts as well?

"A. Very definitely." (See also R. 2200-2201.)

Mr. Kennedy's views were echoed by several other representatives of institutional investors. Mr. J. Victor Herd, Chairman of the Board of the America Fore Insurance Group (which owns common stock valued at about $820,000,000, approximately double the value of the common stock holdings of any other insurance company (R. 1831)), stated that adoption of the Government plan would make General Motors stock much less attractive as an investment for his companies or, as he put it, would "delusterize • • • the desirability of these [General Motors] shares" (R. 1841). Mr. Herd testified that his companies therefore would purchase General Motors stock only if

"• • • pressure on sale of that stock • • • would take it down in relation to the average market prices of comparable shares to where we couldn't very well afford not to avail ourselves at bargain prices." (R. 1841.)

Mr. Herd went on to state that a "bargain price" for General Motors stock, on the basis of the market situation at

the time of his testimony, would be a price at which the stock was yielding 6% to 8% ($25 to $33 per share, assuming maintenance of the present $2 annual dividend) (R. 1843-1844).

Other representatives of large institutional investors testified that if the Government plan were adopted, their companies would buy General Motors stock "only on the basis of an absurdly low price"* or "at a very attractive price"** or if it became more attractive on a yield basis than alternative investment opportunities having better prospects for capital appreciation.† Mr. Moses stated that if the Government plan were adopted, a substantial decline in price would be necessary to induce him to recommend the purchase of General Motors stock by Massachusetts Investors Trust:

> "I think the best answer I could give you is that there would undoubtedly be some price at which we would buy more General Motors, but feeling as I do about the impact of the Government plan, I think this price would be *substantially lower than it is now, at least on a relative basis, relative to the market as a whole.*" (R. 2002.) (Italics supplied.)

Most institutional investors, because of statutory requirements or for policy reasons, diversify their investments by industry and by company within individual industries; consequently, such investors are reluctant to acquire a disproportionate amount of any one security (R. 333, 351-352, 362, 377, 1830, 1836, 1839, 1842-1843, 1891-1892, 1999). Many institutional investors already have substantial

---

* Mr. Charles F. Caley, Assistant Treasurer of the Aetna insurance companies (R. 1802-1803).

** Mr. Ralph Lowell, President of the Boston Safe Deposit and Trust Company (R. 1941).

† Mr. William B. Moses of Massachusetts Investors Trust (R. 2002, 2004-2005); Mr. Kingsley Kunhardt, Vice President of Guaranty Trust Company of New York (R. 1896-1897).

holdings of General Motors stock, and under the Government plan those holding du Pont stock would receive additional General Motors shares.* Such investors might well regard their present General Motors holdings, augmented by the distributions provided for in the Government plan, as more than sufficient. Only a sharp decline in price, with the attendant increase in yield, would induce such investors to purchase additional General Motors stock if the Government plan were adopted.

Even the Government's own witnesses recognized that if the proposed decree were approved, new institutional demand for General Motors stock would arise only at lower prices. Mr. Edward G. Kinloch, manager of the Trust Investment Operations Department of General Electric Company, testified that adoption of such a decree would cause his company's pension fund to be "somewhat cautious" about purchasing General Motors stock (R. 353). Dr. James J. O'Leary, director of economic research for the

*Mr. Herd testified that the distributions provided for in the Government plan would increase the America Fore Insurance Group's holdings of General Motors stock from 249,500 shares to approximately 420,000, an increment of 68% (R. 1838-1839). The effect which such distributions would have on the General Motors stockholdings of several other large institutional investors is demonstrated by the following table:

Investor	Witness	Page of Record	Percentage Increase in General Motors Holdings as a Result of Distributions
General Electric Company Pension Trust	Kinloch	352-353	38%
Prudential Insurance Company	Shanks	811-813	26%
Aetna Casualty Company	Caley	1799	61%
John Hancock Mutual Life Insurance Company	Lowell	1947	21%
Massachusetts Investors Trust	Moses	1998	22%

Life Insurance Association of America, suggested that if the Government plan were adopted, life insurance companies might purchase additional shares of General Motors stock "if it came down in price, * * * at what they might regard as a very favorable price" (R. 365-366). Similarly, Mr. Carrol M. Shanks, President of Prudential Insurance Company, stated that his company "would sit tight with no inclination to buy any more [General Motors stock] until we saw what happened" after adoption of the Government plan (R. 812). Dr. Roger Murray of Columbia University admitted that "this demand [for General Motors stock] will be obviously stronger at a lower price" and "the stock will be more attractive to the institutional type of investor" if the price should decline (R. 790).

Thus the evidence is clear and uncontradicted that the Government's divestiture plan, while causing a tremendous increase in the supply of General Motors stock on the market, would at the same time substantially decrease the demand for that stock, creating an imbalance between supply and demand which could be corrected only by a decline in price sufficient to stimulate the entry of new demand into the market.

3. **The impact on the market price of General Motors stock would be severe.**

With the amount of General Motors stock to be marketed increased by one-third or more (see p. 72, *supra*) and the demand for that stock curtailed, its price would inevitably be depressed. As Dean Jacoby of the Graduate School of Business Administration of the University of California at Los Angeles testified (R. 1732):

> "In other words, the supply of General Motors stock is increased and the plan has no influence whatever in increasing demand. So it seems to me axiomatic that price must fall in accordance with the ancient and immutable law of supply and demand."

Just how much the price would be depressed cannot be stated precisely, for there is no known scientific method or mathematical formula whereby the future actions of the stock market can be forecast. But for purposes of this case exactitude is not essential. So long as the depressing effect on price and the resultant injury to innocent shareholders are substantial, the trial court properly gave the matter weight in fashioning its decree.

The persons best able to predict, even roughly, the extent of the depressing effect which the Government plan would have on the price of General Motors stock are those whose business is pricing, selling, distributing and purchasing large blocks of securities.

General Motors and du Pont called such persons as their witnesses. They called investment bankers, whose business success depends on the soundness of their judgments in anticipating market reaction to the timing and pricing of particular security offerings. Such witnesses were not called merely to express general opinions as to the growth of institutional investment, past stock market trends, or general economic theory; they testified directly regarding the impact which the Government's proposed decree would have on the market price of General Motors stock.

That the opinions of such persons on this issue are entitled to great weight was recognized by two of the principal Government witnesses. Dr. Roger Murray indicated that he would defer to the judgment of the investment bankers "as to the price at which you might have to offer the [General Motors] stock in order to move it on the market," if the Government plan were adopted (R. 787-788). Professor Irwin Friend characterized investment bankers as "the one class of persons that would have the highest competence" to advise the trustee regarding the timing and pricing of his annual forced sales (R. 1040).

The investment bankers were unanimous in their opinions that approval of the Government's proposed decree would depress the price of General Motors stock for a prolonged period. Their estimates as to the extent of that depressing effect varied, but all agreed that it would be substantial. Reference has already been made to Mr. Forgan's testimony that only a significant reduction in price would attract investment capital sufficient to absorb the additional General Motors stock which would be forced onto the market by the Government plan. When asked about the price level at which he would expect such new demand to enter the market, he stated (R. 2238):

> "Well, based on the current market conditions, and the current price for General Motors stock, my conclusion is that the stock could only attract the kind of buyer we are talking about [institutional investors] at approximately 30 per cent under its present market value, which comes to a price of around $33.00 per share, and a yield of 6 per cent, approximately."

Mr. Forgan went on to testify that the full depressing impact of the Government plan would be felt immediately after the adoption of that plan, because "the stock market discounts the total of the factors involved in any situation" (R. 2239).

Mr. Emerson, whose duties at Morgan Stanley & Co. include determination of "the price at which offerings of common stock should be made at market" (R. 1481), undertook a careful study of the proposed decree (*ibid.*). On the basis of that study and his 35 years of experience in the securities business, he concluded that adoption of such a decree would depress the price of General Motors stock to "somewhere in the area of 20 to 25 per cent below what General Motors would have sold [for] except for such a court order" (R. 1524-1525).

Mr. Emerson pointed out that this would not be just a temporary market effect. He said (R. 1521-1522):

"The market for ten years would be glutted with General Motors stock.

• • •

"Well, any informed investor would know that this condition was going to continue for a full ten-year period. There would be no hurry for him to buy. Even if the first year, the market for General Motors went off definitely, so that based on today's standard it looked like an attractive offering, nevertheless that investor would know that he didn't have to hurry. It would be the same way the next year and the next year, and so on, for ten years."

He also noted that during the ten-year period there probably would be times when the adverse effect of the Government plan would be exceptionally severe because (R. 1523):

"In the period of ten years there are bound to be occasions again where the market will be quite soft, where it would be not only difficult to get a good price because the market is going down, but at a time like that the whole psychology of the market is pessimistic and it is very difficult to get investors to absorb large amounts of securities in a declining market.

"I think it would be extraordinary if there weren't several periods of that type during a ten-year period."

Mr. Lenz of Merrill Lynch also testified that the price of General Motors stock would be seriously depressed if the Government plan were adopted. Mr. Lenz, who has had 30 years of experience in the underwriting of stock issues and other aspects of the securities business, concluded that:

"If the judgment proposed by the Government were put into effect, it is my opinion that General Motors stock would sell 20 to 30 per cent below where it would have sold were this judgment not enforced." (R. 2081.)

He then explained (R. 2084):

> "• • • the 20 to 30 per cent adverse impact which I foresee to the market for General Motors stock does not take into account to any substantial degree the additional selling which I feel will take place from the holders of the existing 218 million shares, roughly, who are not affected by the plan except insofar as the price decline loses money for them on their existing holdings."

The foregoing estimates by investment bankers are supported by the testimony of institutional investors regarding the adverse effect which the Government plan would have on the attractiveness of General Motors stock as an investment. As we have seen, those investors, who would constitute the principal source of new demand for General Motors stock (*supra*, p. 74), indicated that they would purchase that stock only at prices substantially below what would otherwise be the normal market price. See pp. 76-80, *supra*. This confirms the investment bankers' testimony that a substantial decline in price would be necessary to generate enough new demand to absorb the additional supply of General Motors stock which would be forced onto the market by the Government plan.*

4. Divestiture would seriously injure the stockholders of General Motors.

The evidence reviewed demonstrates the correctness of the trial court's finding that adoption of the Government

* The Government suggests that the harmful effects of divestiture would be reduced if du Pont offered its General Motors stock to its stockholders in exchange for their du Pont stock. Apart from other difficulties with this proposal, it could not operate effectively on a substantial scale unless the du Pont stockholders (who presumably had invested in du Pont because they preferred it to other stocks) were offered the General Motors stock at a discount from the market price. They would otherwise have no incentive to exchange their stock. An offering of such a tremendous quantity of General Motors stock at a discount, however, would surely have a serious depressing effect on the market price of that stock.

plan would seriously depress the market price of General Motors stock throughout the ten-year period of divestiture. For purposes of this case it is unnecessary to pinpoint the extent of the decline. Because there are more than 282,000,000 shares of General Motors stock outstanding (GX 691, R. 2634, 3007), even a slight decline in price would cause a severe loss in market values. A decline of only 10 per cent from a price of $40 per share, for example, would cause a loss of more than $1,125,000,000 in market value, and a decline of 30 per cent from that price would decrease the market value of General Motors stock by more than $3,380,000,000.

Those losses would be imposed on the more than 750,000 General Motors stockholders, innocent persons who were in no way connected with du Pont's violation of the Clayton Act. A very large proportion of them are "small stockholders". Almost two-thirds own 100 shares or less of General Motors stock, and approximately 80 per cent own 200 shares or less (GX 691, p. 22, R. 2634, not printed).

Many more than 750,000 persons, however, would be injured by a decline in the market price of General Motors stock. In addition to the 550,741 individual (non-corporate) stockholders, the General Motors stockholder list includes (as of December 31, 1958) 142,410 joint tenancy accounts, each of which represents ownership by at least two persons (*ibid*). Any decline in the price of General Motors stock would also injure thousands of other persons having indirect interests in that stock. Among the General Motors stockholders are more than 57,000 "institutional shareholders and miscellaneous groups" each of which holds its stock for the benefit of numerous persons; included in that category are insurance companies investing for the benefit of policyholders and stockholders, employee benefit and pension funds, hospitals, foundations, libraries, churches, museums, colleges and other educational, re-

ligious and cultural institutions, fraternal organizations and mutual funds (GMX 27, R. 1988-1989, 3127; GX 691, p. 22, R. 2634, not printed).

Nor are we dealing with just a temporary paper loss. Several witnesses testified that the price of General Motors stock would be depressed throughout the entire ten-year period encompassed by the Government plan (Emerson, R. 1525; Jacoby, R. 1731, 1738; Kennedy, R. 2172). A depressant effect lasting for ten years can scarcely be deemed "temporary". Many General Motors stockholders would sell their stock during the divestiture period, either because they needed money for the purchase of a home, or for sending children to college, or in liquidation of an estate, or for any number of other reasons; those persons would be most directly affected by the adverse impact of the Government plan on the market price of General Motors stock. Although it is not possible to determine exactly what proportion of the outstanding General Motors stock would be sold during the divestiture period, it is apparent that the amount, and consequently the direct injury to General Motors stockholders, would be substantial. In view of the normal volume of trading in General Motors stock and the additional sales which would be caused by a decree of divestiture, it is clear that any significant diminution in the market price of that stock would cause losses running into the hundreds of millions of dollars.*

* During 1955, 1956 and 1957, the last years covered by the record (DPX 52, R. 2229, 3058), about 9 million shares of General Motors stock were traded annually. Over ten years this would amount to 90 million shares. To this must be added the sale of almost 20 million shares required by the Government's proposed decree and the sale of a substantial part of the stock distributed to du Pont stockholders, which would amount to at least 10 million shares more. See pp. 65, 68, *supra*. (These figures are, of course, subject to adjustment upward because of sales by present General Motors stockholders as a result of the divestiture decree, and downward to avoid double counting of shares sold more than once during the ten-year period.)

The evidence which we have summarized fully supports the District Court's finding that (R. 3263) "there would be a serious risk that the sales caused directly and indirectly by its [the Government's] proposed decree would depress the market value of the two stocks [General Motors and du Pont] and cause substantial losses to the many thousands of direct or indirect holders of such stocks who cannot conceivably be called guilty persons or even persons aware of any illegality."

5. **Divestiture would impair General Motors' ability to raise equity capital.**

In addition to depressing the market value of their stock, divestiture would further injure General Motors' stockholders by impairing the corporation's ability to raise equity capital.* As one experienced investment banker testified, adoption of the Government plan would make common stock financing by General Motors "highly uneconomic and very difficult of accomplishment" (Lenz, R. 2082).

As has been shown (*supra*, pp. 65-80), execution of such a decree would deter many investors from purchasing General Motors stock, and would create an abnormal additional supply of that stock with which any new issue would be forced to compete. Consequently, General Motors could market new common stock only at a "discount [which] would be considerably larger than it would be under normal conditions" (Forgan, R. 2241).** At a lower selling

* Although some economists regard preferred stock issues as "equity financing" (R. 1549-1550, 2023), that phrase will refer in this brief only to common stock offerings.

** See also Lowell, R. 1966; Moses, R. 2009; Lenz, R. 2082. The conclusions of those experts are supported by the experiences of Aluminium, Ltd. in its attempts to raise equity capital under somewhat similar circumstances. Each of the three separate rights offerings made by that company during the period of divestiture

(*Continued on next page*)

price per share, more shares would have to be sold to obtain a given amount of capital; as Dean Jacoby pointed out, the cost of that capital would thereby be increased (R. 1739):

> "• • • If, for example, the price of General Motors stock should be depressed by a factor of 20 per cent under the level it would otherwise reach, this would mean that the cost of capital to General Motors would increase by 20 per cent; or, to be specific, if General Motors would have been able, in the absence of the plan, to have sold stock for, let us say, $50 a share, paying a $2.00 dividend, equity capital in effect is costing it four per cent. If now, as the result of the plan, the stock were to be depressed to, say, $40 per share, equity capital would now cost it five per cent; and this would be a penalty that General Motors would have to bear, a handicap, as compared with other business corporations with which it is competing for capital."

The underwriting cost of a new General Motors common stock offering would also be increased because of the greater marketing problems which the underwriters would face under the Government plan. Because du Pont and Christiana could not exercise pre-emptive rights,* their 23% of a rights offering would have to be disposed of by the underwriters, who normally would expect to sell only a very small proportion of the total offering, and who

---

under the *Alcoa* decree (see Govt. br., p. 63) was made at an unusually large discount, despite the fact that those offerings were made during a period of rising stock prices. The first, in the fall of 1951, was at 35 per cent below the market price. The second, in May of 1953, was at 25 per cent below the market price (and the then market price represented a sharp decline from the price just a few months earlier). The third, in January of 1955, was at 37 per cent below the market price. (GX 270, R. 937, 2777; GX 275, R. 941, 2779; GX 277, R. 942, 2783; GX 445, R. 1284, 2848; GX 446, R. 1284, 2849).

* The Government plan would prohibit du Pont and Christiana from acquiring additional General Motors stock by any means (Article VIII, R. 15).

would therefore expect to receive increased compensation for the greater risk (R. 1547, 2082).

Indeed, the testimony was that there would be difficulty in getting an underwriting group together. Mr. Lenz testified that if at the time of the offering Merrill Lynch was "recommending sale of the [General Motors] stock or had a negative attitude on it, we would be forced, unfortunately, to decline an underwriting position, in the group that would market it" (R. 2082-2083). Moreover, an increase in the underwriters' spread would be necessary to compensate them for the added risk due to competition from the General Motors stock being forced onto the market by that plan. Commenting on these problems, Mr. Forgan said (R. 2241):

> "I do not think you could get an underwriting group together, and mind you it would have to be a big one, to underwrite that offering unless, first, you had the agreement of the trustee not to sell during the standby period, which is usually two weeks and, secondly, that it was offered at such a price that the underwriters would consider that the price took care of the obvious risk here of unregulated sales during the time of their standby. * * * the discount would be considerably larger than it would be under normal conditions."

Mr. Lowell agreed that General Motors would have to pay "more money * * * in terms of commission to their underwriters than they would have if this cloud were not overhanging the market" (R. 1966).

The combined effect of these various factors would probably deter General Motors from seeking equity capital while the Government plan was in effect. Mr. Forgan testified that "the price that that stock could be underwritten at would be so injurious and so low that the company would be ill advised to use that form of financing" during the divestiture period (R. 2240). When asked whether he, as

an underwriter, would recommend that General Motors attempt to raise equity capital, he replied (R. 2241):

> "No, except under circumstances that I cannot possibly foresee. Dire circumstances of some kind might come along where they would have to do it, but generally speaking I would say no."

Messrs. Emerson (R. 1547), Jacoby (R. 1739), Lowell (R. 1966-1967), Moses (R. 2009) and Lenz (R. 2082-2083) testified to the same effect. Mr. Shanks, who testified on behalf of the Government, admitted that adoption of the proposed decree would seriously hamper equity financing by General Motors (R. 815, 823).

General Motors' management should be free to utilize whatever method of financing is most suitable to the needs of the corporation. Although General Motors could, of course, obtain capital by borrowing instead of by issuing common stock, it was testified that no corporation can successfully engage in debt financing indefinitely without seeking equity capital (Shanks, R. 815; Emerson, R. 1561). Moreover, equity financing has certain advantages; it is a permanent addition to capital which need not be repaid, and dividends, unlike interest, need not be paid unless earned. If equity financing would be preferable but for adoption of the Government plan, the availability of debt financing would hardly mitigate the injury to General Motors and its stockholders. On this point the District Court properly found, after reviewing the evidence (R. 3234):

> "While there is no evidence that the Government proposal would make it difficult for General Motors to do debt financing, the Government's witness, Mr. Shanks, President of Prudential Life Insurance Company, testified that a company could not do continuous debt financing without doing some equity financing.

as well and that the Government plan would pretty well prevent General Motors from equity financing.

"Inability of General Motors to do equity financing might have a serious adverse effect on General Motors raising the capital needed to maintain its position in the industry."

* * *

(R. 3263):

"Another factor that should be given some consideration is that the Government plan would seriously handicap General Motors from doing any common stock financing during the period of the plan, to its possible detriment and the injury of its stockholders."

As recently as 1955, General Motors found it advisable to raise $325,000,000 in equity capital (DPX 30, R. 1549. 3035). And there was testimony that because of changes in the automobile industry and the costs attendant to the introduction of new types of automobiles, General Motors "would probably have greater need for equity financing in the 10 years ahead of us than it has in the past 10 years" (R. 2009). Should such a need arise while the Government plan was in effect, the corporation would be handicapped; the ultimate loss, of course, would be borne by General Motors' stockholders, the same innocent persons who would be injured by the depressant effect of divestiture on the market value of General Motors stock.

C. The Evidence on which the Government Relies Does Not Show that Divestiture Can Be Accomplished Without Harm to Innocent Stockholders.

The Government asserts again and again that divestiture can be accomplished without substantial adverse market effects (br., pp. 13, 26, 59, 64, 72-73, 75), but mere repetition cannot impart verity to this unsubstantiated claim. Although the Government called a number of wit-

nesses who had wide experience in the securities market,* none of those witnesses was asked to discuss the probable market impact of the Government's proposed decree. Government counsel studiously avoided any such inquiry. The reason for this strategy is apparent: Government counsel were simply unable to find any person experienced in the securities market who would testify that divestiture would not seriously depress the market price of General Motors stock.

The Government blithely ignores all of defendants' evidence about the market impact of the proposed divestiture decree. Instead, the Government seeks to draw from the evidence presented by Dr. Irwin Friend the unwarranted inference that the Government plan would cause only a small and temporary market impact. This, however, was not Dr. Friend's testimony. Dr. Friend had not studied the Government plan, he did not know its details, and he carefully refrained from expressing any opinion about its potential impact upon the value of General Motors stock. He made his position clear on cross-examination when he stated (R. 1045):

> "It is my impression that either I did not make myself clear or you were not listening to what I said. I indicated, I thought very clearly, I was not familiar with the details of the Government plan.
>
> "I answered hypothetical questions and I also gave answers to hypothetical assumptions, under hypothetical assumptions, which I stipulated." (See also R. 1034, 1039 and 1040.)

---

*Schroeder Boulton, partner in charge of research, Baker Weeks & Co.; Ralph C. Sheets, vice president in charge of sales, Blyth & Co.; Edward T. McCormick, President, American Stock Exchange; George Weiss, partner in charge of research and sales, Bache & Co.; Edward Townsend, vice president and a director, First Boston Corporation; Sydney G. Duffy, vice president and national syndicate manager, Blyth & Co.

The Government refers (br., pp. 14-15, 75) to Dr. Friend's testimony that "in the long-run," the relative prices of stocks are determined by current and anticipated earnings and dividends (R. 987). But he also agreed that "supply and demand reflect the appraisal that the investors make of these factors of prices and earnings or dividends" (R. 1024-1025). He added that if "an equilibrium position" were reached in a particular stock, but "all of a sudden a large amount of stock is supplied, in other words, thrown upon or added to the existing supply, or a large amount is demanded, then until this temporary imbalance were erased this would affect the price of stock in the obvious direction" (R. 1024). And he agreed that "recurrences of that distortion • • • would affect the price of the stock over the period of time that the recurrences occurred", which "might be a long time or short time" (R. 1024-1025).

Under Dr. Friend's direction studies had been made of certain securities offerings which had occurred in the past (GX 619-668, R. 2551, 2942-2991; see Govt. br., p. 13), and from these he concluded that increases averaging approximately 10% in the outstanding stock of a company had in the past been associated with an average price decline of roughly 5% (R. 1018-1020). He did not contend, however, that this historical evidence of average market impact of past offerings could support any very positive predictions with respect to the impact of future offerings; he said merely (R. 993):

> "• • • I think that if you have an average experience covering all the stocks offered over a given size in the past, this gives you by no means completely reliable evidence as to what is likely to happen in the future, but better evidence than you can get by not looking at such data."

Dr. Friend was even more careful to avoid stating that his historical averages would give any clue at all to the

probable effect which the Government plan would have on the price of General Motors stock. He made a point of the fact that "• • • there are so many individual influences affecting any individual stock flotation—and one could enumerate dozens and dozens—• • •." (R. 988.) Thus, he said, the past performance of any particular stock could not form the basis for any valid general conclusion about the future (R. 992-993):

> "There is, to my knowledge, no way of picking an individual stock, where you had a new offering, representing a definite increase in the supply outstanding, and saying that this particular single experience represents what is likely to happen in the future in similar offerings of identically the same dollar magnitude or relative magnitude, etc.
>
> "The reason is, again, as I suggested earlier, that there are dozens and dozens of influences on stock prices."

The experience of the past, Dr. Friend concluded, is of only limited assistance (R. 1032):

> "• • • As I indicated earlier, I am very dubious that anyone can take a particular illustration in the past, no matter how much you know about the illustration, including the question of who underwrote it, the nature of the underwriting, the nature of the overhang, et cetera, et cetera—I don't think you can infer validly from any one instance in the past; I think you can only infer validly within limitations, that the future may be the same as the past, on the basis of average experience."

But, if one cannot base a general rule of stock market performance upon the action of any one particular stock, it must be at least equally true that one cannot state that a particular stock will behave in a particular way simply because the performance of many stocks may be expected

to average out to a particular result. If one cannot generalize from the particular, one also cannot particularize from the general. Dr. Friend recognized this, for he agreed that a substantial increase in the supply of General Motors stock could produce an impact anywhere within the extreme range of the figures which made up his historical average (R. 1034), thus making it clear that he, certainly, would not attempt to predict the future from the somewhat muddled past.

When Government counsel asked Dr. Friend a "hypothetical" question about the probable price impact of the proposed forced sales of 20 million shares of General Motors stock over a ten year period at the rate of 2 million shares per year, he gave no direct answer, stating (R. 1020):

> "Let me state, first of all, that it is, in my opinion, impossible to state what will happen in any particular situation without knowing in advance a lot more data than are assumed under any set of assumptions one might make beforehand.
>
> "It depends on the state of the markets. It depends, speaking not completely facetiously, on what people have for breakfast the day of the offering, and so forth."

Dr. Friend made it apparent that he "would not have any strong degree of confidence in any particular percentage effect" (R. 1016), and he pointed out that "the average behavior in the past [which is all that he testified to] is admittedly not identical with the situation you are raising" (*ibid.*).

Not only was the average behavior of the past not identical, but also, in Dr. Friend's view, no particular past experience was even comparable to the increase in supply contemplated by the Government decree. "Each case represents

a sample of one," he said, "where many additional influences were undoubtedly present; * * *" (R. 994); "* * * past experience, of course, does not include any such case—" (R. 1036); "* * * there wasn't such a situation in the past" (R. 1037).

Unlike Dr. Friend, however, the Government brashly suggests that the results of a few of the many stock issues which Dr. Friend discussed indicate that divestiture could be accomplished here without financial loss. More particularly, the Government relies upon the sales of Aluminium stock pursuant to the decree in *United States* v. *Aluminum Co.*, 91 F. Supp. 333 (S.D. N.Y., 1950), two secondary offerings of General Motors stock, the General Motors rights offering in 1955, the 1956 and 1959 secondary offerings of Ford stock, the 1959 secondary offering of A & P stock, and the post-war issues of securities by American Telephone and Telegraph—primarily in the form of convertible debentures. (Govt. br., pp. 63, 76-78). Obviously these are the offerings which the Government deems most analogous. Examination of each of them, however, proves the truth of Dr. Friend's conclusion that no stock issue in the past has been comparable to what is contemplated under the Government plan.

The *Aluminum* decree, for example, ordered divestiture of only 1,287,975 shares of stock, valued at less than $125,000,000, and gave the parties ten years within which to divest (GX 438, R. 1277, 2842).* The Government's proposed decree here would require forced sales of almost 20,000,000 shares of General Motors stock with a value which in recent years has ranged from 800 million dollars

* These figures are as of January 16, 1951, the effective date of the *Aluminum* decree. The Government refers (br., p. 63, n. 41) to the number of shares after stock splits of 2-for-1 in 1952 and 3-for-1 in 1957. (GX 438-439, R. 1277-1278, 2842, 2844.)

to more than one billion dollars. Moreover, the sales of Aluminium stock, small as they were in comparison with what is proposed here, were not accompanied by simultaneous taxable distributions (as here contemplated) of over twice as many additional shares, large numbers of which are likely to flood the market at the very time the trustee makes his sales.

The Government seeks to give the impression (br., p. 63) that the forced sales of Aluminium stock did not adversely affect its market price. It compares the price of Aluminium stock with industrial stocks generally, ignoring the evidence demonstrating that the value of Aluminium stock suffered quite markedly in contrast with the remainder of the aluminum industry, with which it is more appropriately compared (R. 1596, 2068-2070; DPX 47, R. 2260, 3052B). The Aluminium divestiture occurred during a period of tremendous growth for the aluminum industry (R. 1596, 2147). It cannot be assumed that the automobile industry is going to have any comparable growth during the next ten years (R. 2173, 2199). Thus, if any conclusions are to be drawn at all, the experience of the Aluminium divestiture strongly supports the conclusion that the market value of General Motors stock would be sharply depressed if the Government decree were adopted.*

The Government also relies upon two secondary offerings of General Motors stock by existing stockholders and the rights offering by General Motors to its stockholders in 1955 (br., p. 76). None of those sheds light on the problem here.

---

* The Government also refers (br., p. 63) to three rights offerings to Aluminium stockholders during that period, but fails to note that each of those offerings was made at a substantial discount from the market price (see note, pp. 87-88, *supra*).

A secondary offering, such as one of the annual forced sales required by the Government plan, is a sale by a stockholder of outstanding stock; the proceeds go to him, not to the company. A rights offering, on the other hand, is an offering of new stock to existing shareholders at a substantial discount from the current market price (R. 1498), with the proceeds going to the company for corporate expansion. Mr. Emerson considered rights offerings "hardly comparable at all" to the secondary offerings contemplated by the Government plan (*ibid.*), and Dr. Friend conceded that of the three kinds of stock sales he had considered, rights offerings were the "least relevant" (R. 1000). The court below found that it was "plain that rights offerings • • • have little relevance because of the difference in the circumstances" (R. 3218).* Thus the fact that General Motors was able to sell a large amount of new stock in 1955 at a 26% discount from the market price** through the issuance of

---

* In full text, the District Court's finding was (R. 3218-3219):

"Also, from the testimony it seems plain that rights offerings by corporations to their own stockholders have little relevance because of the difference in the circumstances. In rights offerings the corporation is free to fix a subscription price substantially below the current market. Then the stockholder receiving the rights can sell the rights. The offering is made to a body of people already interested in the company. Anyone exercising a right can borrow from a bank 75% of the value of the stock, whereas under existing regulations on a secondary offering the purchaser can borrow only 10%. Further, in a rights offering the valuable mechanics of purchasing rights and exercising them and selling the stock so acquired is available to the underwriters, a process known as a 'lay-off'. This procedure has a stabilizing effect and is very helpful to the success of the operation. However, it is not deemed 'stabilization' under present rules and underwriters can purchase such rights without reference to the stringent stabilizing rules of the Securities and Exchange Commission. The 'lay-off' procedure is, of course, not available in a secondary offering."

** The government brief fails to mention the 26% discount, which was "one of the largest to be found on common stock offerings in recent years" (GX 66, R. 557, 2661).

rights to its shareholders (GX 66, R. 557, 2661) proves nothing with respect to the probable market impact of the forced sales required by the Government plan. It certainly does not prove that a vastly larger amount of stock could be sold at the prevailing market price.

Although secondary offerings are made at prices as close to the market price as possible (R. 412), Dr. Friend recognized that a large secondary offering may well have a sizable adverse impact (R. 1007). For example, the market behavior of General Motors stock associated with the Sloan Foundation's 1956 secondary offering of 1,275,000 shares of that stock was "definitely worse" than the rest of the stock market in the month of the offering (R. 1006) even though, in Dr. Friend's view, that offering was relatively "very small" (R. 1006, 1041). That offering not only was much smaller than any one of the annual forced sales required by the Government plan, but was a one-shot proposition which would not continue to overhang the market. Thus neither the size nor the market impact of the Sloan secondary proves anything in support of the Government's argument. (The other secondary offering of General Motors stock cited by the Government (br., p. 76), which was only one-fifth the size of the Sloan offering, was not even mentioned by Dr. Friend.)

The Government relies (br., p. 76) upon the first Ford offering, in 1956, despite the significant differences between the circumstances surrounding it and the problem here. Ford was an old, well-established, widely- and favorably-known company whose stock was closely held and had never before been available to the public. Inquisitive and speculative investors, afforded for the first time the opportunity to become stockholders in that company, created a tremendous demand for the stock. On the other hand, there is no pent-up unsatisfied demand for General

Motors stock, which is widely held and has been available to the public for years.

Mr. Emerson testified about the differences between the first Ford issue and the forced sales of General Motors stock under the Government proposal, as follows (R. 1502-1503):

> "Ford Company had been a household word for a great many years. Nearly everybody at one time had had a Model T. People knew that the Ford family had been most successful financially in the Ford Company. They knew nothing about the figures at all.
>
> • • •
>
> "There was a great deal of uninformed buying; there was a great deal of speculative buying, because people thought that with a block of this size, it would have to be priced attractively. There was a lot of foreign buying for speculation account. The underwriting group, I understand, were required to make offerings to the Ford dealers all around the country, and many of the Ford dealers felt an obligation to buy Ford stock.
>
> "It is utterly different than the case of General Motors, where there are over 200 million shares outstanding in the hands of the public, other than the stock held by du Pont and Christiana, where people have had plenty of opportunity to buy General Motors stock for years and years. It is the largest industrial company, in earnings, in the country. Certainly, there was no scarcity value, or anything of that sort, in the case of General Motors.
>
> "So it seems to me that they are not at all comparable, except that they are both in the motor business."

Similar testimony was given by Mr. Lenz, whose firm was one of the seven managers of the Ford issue (R. 2067):

> "The Ford Motor Company has been an American

legend for many years, and we have had all types of customers of our own firm on notice with us that if and when it ever came to market they wanted to buy stock.

"In addition to that, at the time that the offering was brought to market, there were only two high grade diversified automobile company stocks listed on the New York Stock Exchange—General Motors and Chrysler; and for diversification purposes alone, investment trusts and other institutions, as well as individuals, sought to make purchases. Over and above that, the offering was sold at that time at an exceedingly favorable price times earnings basis, a little under eight times, whereas, for example, on the date of sale, General Motors was then selling at about 10.2 times."

Because Ford stock had not theretofore been traded publicly, there was no way to ascertain the depressant effect of that secondary.

Nor was any witness able to state the impact of the Ford secondary in March of 1959, during the hearing below. Professor Friend testified that there must have been some impact—that "rationality" could lead to no other conclusion—but that there were "offsetting factors • • • adequate to take care of any depressant effect" (R. 2408). Among those offsetting factors were the contemporaneous news stories of Ford's greatly increased production and market penetration, announcement of its proposed new smaller car, and other highly favorable financial reports (R. 2132, 2566, 2568, 2608; DPX 59, R. 2637, 3059; DPX 65, R. 2637, 3063). Presumably, such good news would have caused a sharper rise in the price of Ford stock had it not been for the depressing effect of the large secondary offering by the Ford Foundation. However, because no one can tell how much that rise would have been, that 1959 Ford secondary affords no basis for any conclusion about the probable im-

pact of the Government plan upon the price of General Motors stock.*

One other difference stands out: the Ford secondaries were not forced sales. The Ford Foundation can sell whenever and as much as it chooses, or not at all. It was therefore able to select unusually propitious times to make its sales, unlike the trustee under the Government plan, who must dispose of 20,000,000 shares in ten years. Purchasers of Ford stock can rely upon the Foundation to sell additional shares only if and when such propitious circumstances arise. Buyers of General Motors stock under the Government plan, on the other hand, would know that 20,000,000 shares must and would be sold regardless of market conditions, and that the value of the stock would be depressed for ten years.

The A & P secondary (Govt. br., p. 77) approximated the size of one of the annual forced sales under the Government decree. According to Professor Friend, that secondary was accompanied by a decline in the price of A & P stock of at least 10 per cent and perhaps 15 per cent or more (R. 2603-2607). Thus, if that offering proves anything, it supports the predictions of still greater market losses for General Motors stock under the Government's proposed decree, which would require stock offerings of that magnitude to be repeated annually for ten years.

Lastly, the Government relies (br., pp. 77-78) upon a series of eight convertible debenture offerings and one common stock offering by American Telephone and Tele-

* The other Ford secondary, in December of 1959, also referred to by the Government (br., p. 77), occurred after the close of the hearing below. In the absence of evidence with respect to the circumstances surrounding it, it can hardly form the basis for any conclusions about the probable market impact of the Government plan.

graph Company between 1946 and 1958.* The stock issue in 1956 was a rights offering, at $100 per share compared to the market price of $169 to $182 (R. 345, 339, 2072; GX 1, R. 346, 2642), and is not comparable to a secondary offering to outsiders at the prevailing market price (see p. 98, *supra*).**

Nor can a secondary offering properly be compared with the issues of convertible debentures, which were debt securities having a guaranteed interest rate and which could be converted into common stock at prices well below the market (R. 335, 339; GX 1, R. 346, 2642, 2644A). For the most

---

* The Government (br., p. 78) also asserts that AT&T's total equity financing in this period was $7,200,000,000 (R. 319-320). It does not state (as the same pages of the record disclose; and see also GX 1, R. 346, 2640) that this consisted of:

Convertible debentures	$ 3.9 billion
Conversion premium on the debentures	$ 1.6 billion
Total from the convertible debentures	$ 5.5 billion
Stock rights offering to shareholders	.6 billion
Stock rights offering by subsidiaries to their minority shareholders	.2 billion
Employees stock plan	.9 billion
Total	7.2 billion

All of these securities were offered to the stockholders or employees at a discount. As to the debentures, compare GX 1, R. 346, 2644A with R. 335, 339. As to the employees stock plan, see GX 1, R. 346, 2643. As to the stock offering, see text.

** Mr. Lenz testified: "I can't see any comparison whatsoever between the way the telephone company has raised their new capital and the problem presented by the sales of the trustee and the possible additional sales from the existing du Pont shareholders who obtain General Motors stock.

"The only common stock offering which the telephone company had in recent years is the one for ten rights offering at $100 a share, while the market for the stock was $182, or a discount of over 45 per cent.

"So that obviously anybody in his right mind could see that the stock would be picked up even if for any reason a calamity happened." (R. 2072.)

recent issues, in 1955 and 1958, the conversion prices were $148 and $142 compared with market prices of $182 and $172 on the same dates. (Cf. R. 339; GX 1, R. 346, 2644A.)

Convertible debentures are more readily marketable than common stock; although they are offered first to the existing stockholders, they are also purchasable in unlimited quantities by banks and insurance companies, whose right to buy common stocks is limited by law (R. 338, 477). Moreover, banks can loan up to 85% or 90% on the purchase of debentures, but only 10% on common stock purchases (R. 432-433; GX 1, R. 346, 2642). Mr. Scanlon, Treasurer of AT&T, a Government witness, stated that the advantage of using convertible debentures was a "cushioning of the market impact of the new shares" (GX 1, R. 346, 2641-2642). He stated, nevertheless, that "the overhang of repeated offerings" of stock and convertible debentures "has held the stock price down" (R. 338-339).

Mr. Emerson pointed out that the marketing methods used in selling debentures are "utterly different" from the methods used in selling common stocks, in large part because the seller must look to different sources of demand for the two different types of securities (R. 476-477). Mr. Lenz testified that the convertible debenture is "a completely different breed of a cat than a common stock offering in that it appeals to a different type of investor, the institutional investor," "[margin] requirements in the form of cash to be put up are rather small," and the amount of money available for purchases of such securities is "far in excess of the amount available for stocks" (R. 2072-2073). On the basis of that undisputed testimony, the court below found that

> "* * * offerings of debt securities, even if convertible into common stock, have little or no relevance to the secondary offering which would have to be made by the trustee under the Government plan." (R. 3218.)

Indeed, when objection was raised to the relevance of exhibits relating to sales of debentures, Government counsel contended only that such evidence might show that General Motors could raise money by debt financing (R. 449-450); no claim was made that such evidence was relevant to the forced sales of common stock required by the Government's proposed decree.

The Government attempts to support its argument that forced divestiture can be accomplished without financial loss to investors by quoting (br., pp. 63-64) from a report of the Securities and Exchange Commission summarizing the beneficial effects of the Public Utility Holding Company Act. The reorganizations under that statute, however, which took many forms, were designed to remedy unsound corporate structures in order to eliminate abuses harmful both to investors and to the general public (as the report and article cited by the Government demonstrate).* Although a number of the reorganization plans involved divestiture of various amounts of stock in various circumstances, none of them was similar either in magnitude or other facts to the instant case. One important difference was that in the Holding Company Act reorganizations the stockholders were exempt from paying income taxes on what they received by way of distribution. Internal Revenue Code of 1954, as amended, §§ 1081-1083 (26 U.S.C. §§ 1081-1083). Obviously no fruitful comparison can be made between the holding company reorganizations *en masse*, without regard to the facts of any of them, and the forced sales and taxable distributions contemplated in this case.

Thus none of the past offerings of securities relied upon by the Government supports the argument that divesti-

*Securities and Exchange Commission, 25th Annual Report (1959), pp. xxvi-xxviii; Blair-Smith and Herrenstein, *A Death Sentence or a New Lease on Life?*, 94 U. of Pa. L. Rev. 148, 158 (1946).

ture could be accomplished without serious adverse impact upon the price of General Motors stock. None of the evidence regarding those offerings contradicts the considered opinion of the expert witnesses who testified that adoption of the Government plan would seriously depress the market value of that stock.

D. General Motors' Needs for Its Own Stock Are Not a Source of Demand which would Prevent Divestiture from Depressing the Market Price of That Stock.

The Government asserts (br., p. 73) that General Motors could alleviate the adverse effects of the Government plan by purchasing from du Pont the stock needed for the General Motors bonus plan and savings-stock purchase program. An analysis of those plans, however, demonstrates the weakness of that argument.

The bonus plan provides for the credit to a bonus reserve of up to 12 per cent of annual net earnings in excess of 5 per cent of net capital (R. 838-839; GX 171, R. 842, 2721); subject to that limitation, however, the bonus and salary committee has complete discretion to determine the amount of the annual credit to the reserve. The bonus and salary committee also decides what portion of the credited amount should be awarded in bonuses to salaried employees in each year (R. 839). In six of the last ten years of record the amount awarded in bonuses has been substantially less than the maximum which could have been credited to the reserve (GX 173, R. 1303, 2735). In 1957 about 13,000 employees received bonuses (R. 846). The awards are paid partly in cash and partly in stock. In recent years the proportion has been about one-half cash and one-half stock, but this is determined by the committee each year (R. 840; GMX 8, R. 872, 3114). The stock must be reacquired rather than newly-issued (R. 850).

The short answer to the suggestion that General Motors could lessen the market impact of the forced sales by buy-

ing its bonus stock from du Pont is that the stock for the bonus plan has long been purchased on the open market; as the District Judge recognized (R. 3215), General Motors' demand for that stock already is a part of the demand side of the supply and demand picture, and would not constitute new demand to offset any part of the additional supply which would be dumped on the market under the Government plan. If General Motors bought the stock from du Pont, there would be that much less demand for other General Motors stock on the market. Thus the difference between total demand and total supply created by forced divestiture, and the impact of the imbalance upon price, would be exactly the same.

It should also be noted that there is not the constancy in the demand for bonus stock which the Government implies. The amount of stock which will be awarded as bonuses each year is contingent upon the earnings of the corporation and the discretion of the bonus and salary committee (*supra*, p. 106; see also R. 837-840). Thus the purchases of stock for bonus purposes would be lowest or even nonexistent during periods of poor business conditions, and it is during such periods, when the stock market tends to be unsettled or declining, that the impact of the forced sales by the trustee is likely to be most severe. Although the Government argues that General Motors annually has needed over 1,000,000 shares for its bonus plan (br., p. 73), the fact is that in 1958, the last year of record in this case, General Motors purchased only 650,600 shares for bonus purposes (GMX 7; R. 870, 3113). There can thus be no certainty that in the future the bonus plan could be counted on to absorb any particular portion of du Pont's General Motors stock.

There is even more uncertainty as to the stock requirements of the General Motors savings-stock purchase

program. Under this program, which was inaugurated in 1955, salaried employees* may deposit up to 10% of their salaries, and the corporation adds half of what each employee puts in (R. 860-861). Half of the employee's contribution is invested in Government securities, while the remainder and the corporation's contribution are invested in General Motors stock (R. 862). It is obviously impossible to forecast accurately the stock requirements of that program. It is completely voluntary, and there is no way to determine in advance the number of eligible employees who will participate, or the amount of their participation (R. 861).

The stock for the savings-stock purchase program may be either newly-issued or reacquired, but in fact only newly-issued stock has been used (R. 877). The use of newly-issued stock means that the program is a continuing source of new equity capital for the company, to the extent of one-half the employees' contributions, while the company's contribution requires no actual cash outlay (R. 877). Purchasing on the open market (or from du Pont) would, on the other hand, be a constant drain on the company's treasury.**

The impropriety of the Government's suggestion that General Motors shoulder the burden of averting some of the impact of the Government plan by buying stock from du Pont is exposed by the Government's own statement (br., p. 74): "Support of the market price of its own stock is not, as such, a proper function of General

---

* The plan was also offered to the hourly workers but was rejected by their bargaining representatives (R. 877).

** Instead of contributing to an increase of capital, the use of reacquired stock would have necessitated a cash outlay of approximately $75,000,000 between 1955 and 1958, the last year of record. (GX 177, R. 889, not printed; GX 691, R. 2634, 3004.)

Motors." General Motors subscribes to this statement. General Motors ought not to be required or expected to support the price of its stock during disposal of du Pont's stockholdings, any more than during the disposal of the holdings of any other large stockholder. If General Motors were to agree to buy du Pont's holdings in order to protect the market price, it would in fairness have to agree to take off the market the holdings of any other large stockholder who wanted to sell. Obviously, it would be improper and unsound as a matter of business policy for the company to assume any such obligation.*

III.

DIVESTITURE IS NOT MANDATORY IN THIS CASE

The Government argues that the District Court is required by the intention of Congress (a phrase which would seem to mean "as a matter of law" if it means anything in this context) to order that du Pont be divested of all interest in its General Motors stock (Govt. br., Point I).** However phrased, the contention is that district courts and this Court have no choice but to order divestiture in all cases under Section 7, irrespective of the injury to others which divestiture may produce, and even though another remedy would

---

* The bonus plan purchases, of course, are a part of the demand factor on the market, but market support is clearly not the purpose of that plan. General Motors attempts to buy at the low price for each day, rather than to establish a new high (R. 874). The Securities and Exchange Commission has been formally advised of these purchases and has raised no objection. (R. 1774, 1781; GX 538, R. 1781, 2635, 2891.)

** The Government argues in other portions of its brief that if divestiture is not always mandatory it should be used unless some substitute form of relief is "both necessary and equally effective" (br., p. 40). In the preceding portions of this brief, it has been shown that the remedy devised by the court below will be completely effective to undo the offensive consequences of the acquisition, and that divestiture cannot be accomplished without undue hardship to innocent persons.

be fully effective to eliminate the illegal consequences of the acquisition.

Such an argument seems inconsistent with this Court's direction to the District Court to determine "the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute" and its statement that,

> "• • • The District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co.* v. *United States*, 332 U. S. 392, 400-401." (353 U. S. at 607-608.)

The references to "equitable relief necessary and appropriate," "public interest," "equitable decrees," and "large discretion" to conform the judgment "to satisfy the exigencies of the particular case" all are in terms of the traditional unfettered power of a court of equity. These expressions manifest this Court's recognition of the broad discretion of district courts to choose the most appropriate among available remedies. The District Court was not being instructed to frame any particular form of decree—even though the Government had argued to this Court that "divestment of the du Pont stockholding in General Motors" was "essential" if the Clayton Act violation was to be cured.*

A. Section 15, Under which This Case Arises, Does Not Make Divestiture Mandatory.

This case was brought under Section 15 of the Clayton Act (15 U.S.C. § 25), which vests district courts with jurisdiction to prevent and restrain violations of the Clayton Act. Section 15, in so far as here pertinent, provides:

* Brief for the United States, No. 3, 1956 Term, p. 149.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

The Government concedes (br., p. 30) that this language does not explicitly refer to any particular type of remedy. The statute clearly does not make any particular form of relief mandatory. It vests the district courts with jurisdiction in equity to prevent and restrain violations. This clearly implies that they possess the general power of equity courts to fashion relief appropriate to the particular case. This Court has declared on several occasions that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith* v. *Winter Haven*, 320 U.S. 228, 235 (1943); *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944).

In the *Hecht* case, the Government was contending that a section of the Price Control Act which stated that "a permanent or temporary injunction, restraining order, or other order shall be granted without bond," made the issuance of an injunction mandatory once violations were proved. This Court rejected that argument, in part upon the basis of the phrase "or other order". But the Court also referred to a committee report which stated that the district courts were being given "jurisdiction to issue" appropriate compliance orders (p. 329). Although the Price Control Act comes much closer than Section 15 of the Clayton Act to being specific in requiring a particular form of relief, the Court there held (pp. 329-330):

"A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any

and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

* * *

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. We do not think the history or language of §205(a) compel it."

Certainly nothing in the "history or language" of Section 15 compels a "major departure" from the "long tradition" of broad discretion which has characterized courts of equity. On the contrary, no language would seem designed more clearly to vest courts with the traditionally broad power of equity than the unqualified grant in Section 15 of "jurisdiction to prevent and restrain violations" in "proceedings in equity".

The background and history of Section 15 and the cases applying the statutory provision from which its language was taken also establish that the district courts are not confined to one form of remedy. Section 15, insofar as here pertinent, was taken *in haec verba* from Section 4 of the Sherman Act. The bill as it passed the House incorporated both the criminal and civil remedies of the Sherman Act. H. Rept. No. 627, 63rd Cong., 2nd Sess., pp. 1-4. With respect to the provision for enforcement by injunction (now Section 15, then Section 13), the House Report stated (*id.* at 21):

"XIII. Same as Section 4 of Sherman Act. Section 13 is a reenactment of section 4 of the act of July 2, 1890, so as to enable the United States to proceed against corporations for the violation of any of the provisions of this act as it is now authorized by law to proceed against corporations for violations of the Sherman Act."

The Senate Judiciary Committee substituted enforcements by the Federal Trade Commission (and other administrative agencies) for the criminal penalty, but left the provision for civil enforcement unchanged. S. Rept. No. 698, 63rd Cong., 2nd Sess., pp. 17, 47, 50. The Senate Report (p. 17) quotes the above passage from the House Report, and adds (p. 50):

"Section 13. This section, which is existing law, is not proposed to be amended in any particular."

In the subsequent Senate debate, members of the Judiciary Committee stated:

"* * * Section 13, I repeat, is but a repetition of section 4 of the Sherman law of 1890, changed to meet the fact that circuit courts have been abolished and district courts inaugurated in their stead." (Senator Culberson, 51 Cong. Rec. 14514.)

"Section 15 of the bill is simply a reenactment of sections 4 and 5 of the antitrust law—nothing more and nothing less." (Senator Nelson, 51 Cong. Rec. 15944.)

See to the same effect 51 Cong. Rec. 16321; 51 Cong. Rec. App. 1181.

These are the only pertinent references to Section 15 in the legislative history of the Clayton Act. They contain no intimation that its general grant of jurisdiction in equity

was to have a more restricted meaning than its language signifies.

By reenacting the language of Section 4 in Section 15, Congress granted the district courts the same remedial powers under the Clayton Act that they had under the Sherman Act. (Cf. *Reina* v. *United States*, 81 S. Ct. 260, Dec. 19, 1960.) Sherman Act cases decided both before and after 1914 have established that the language of Section 4 gives district courts broad discretion in the framing of decrees, and does not make any specific type of remedy mandatory.

In cases decided within the period immediately preceding the passage of the Clayton Act, dissolution or divestiture had sometimes been ordered and sometimes not, depending on the circumstances. In the *Standard Oil* and *Tobacco* cases decided in 1911, dissolution was essential to destruction of the monopolies, but the broad power of equity courts was recognized. (See pp. 56-57, *supra*.) In *United States* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383, decided in 1912, and in *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 217 Fed. 656 (N.D. Ohio),* in which the decision on relief was rendered on June 15, 1914 (four months before the Clayton Act became law), divestiture was not ordered. In the *Towing* case, the court had said (217 Fed. at 658):

> "* * * While the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy, as disclosed by the terms of the act, is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate."

* The Government subsequently dismissed its appeal in this case. 245 U.S. 675 (1917).

After reviewing the remedies which this Court had employed up to that time in Sherman Act cases, the opinion concluded (p. 659):

> "It is thus seen that, even where the remedy by injunction is thought to be inadequate, there is no uniform rule respecting the means to be employed in putting an end to the unlawful combination. Each case must stand upon its own facts; and methods adopted in other cases are not necessarily to be followed as precedents, except where the same situation is presented."

This was a fair summary of the judicial construction of Section 4 of the Sherman Act prior to the passage of the Clayton Act. The Congress of 1914 which prepared that Act in order "to supplement the Sherman Act" (353 U. S. at 697) obviously did so with knowledge of the prior judicial decisions and, as we have seen, Section 4 was carried over to the Clayton Act as Section 15, unchanged.

The decisions since 1914 under both Section 4 and Section 15 have continued to recognize that equity courts are vested with broad discretion and are not restricted to the use of particular forms of remedy. The statements in this Court's opinion in the instant case and in the *International Salt* case as to the large discretion of the district courts to frame equitable decrees, were made in cases decided under the Clayton Act.* In another case under Section 15, *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953), the Court also referred to the "necessarily broad" discretion of the chancellor, which must be "based on all the circumstances." See also *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387

* *International Salt* involved violations of both the Sherman Act and Section 3 of the Clayton Act, but this Court's opinion does not differentiate between the two statutes.

(S.D.N.Y., 1957), affirmed 259 F. 2d 524 (C.A. 2, 1958), *supra*, p. 36, where the effectiveness of disfranchisement led the court to refuse divestiture.

Under the Sherman Act there have been many decisions holding that an unlawful combination or monopoly need not always be dissolved. See p. 51, *supra*. In *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951), this Court through Mr. Justice Reed, speaking for a majority on this point (p. 603), said:

> "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available."

The *Standard Oil* (221 U. S. 1), *Crescent* (323 U. S. 173), *Boxing* (358 U. S. 242) and railroad cases cited by the Government do not hold to the contrary. See pp. 50-51, *supra*. Neither those cases nor any other suggest that divestiture must be ordered to remedy all Sherman Act violations involving stock acquisitions, irrespective of the circumstances and even though other relief may be adequate.

The Department of Justice has accepted consent decrees not requiring divestiture in a number of cases brought under Section 15 for violation of Section 7. For example, in *United States* v. *Schenley Industries, Inc.*, CCH Trade Cases, §68,664 (D. Del., 1957), although the complaint alleged that Schenley had acquired a controlling stock interest in Park and Tilford Distillers Corp., the consent decree did not require divestiture of that stock, but merely enjoined further acquisitions by Schenley. In *United States* v. *General Shoe Corp.*, CCH Trade Cases, §68,271 (M.D. Tenn. 1956), although defendant was charged with

acquiring 18 different shoe companies in violation of Section 7, divestiture was ordered only with respect to the stock of companies in which less than a majority interest was held.* The Federal Trade Commission has entered similar consent orders, and the Interstate Commerce Commission has also found divestiture to be unnecessary in some cases.** (See pp. 128-129, *infra*.)

Thus the major enforcement agencies have recognized that divestiture is not required as a matter of law, and no court has ever held to the contrary. The language and history of Section 15, and the cases decided under that section and the similar provision in the Sherman Act, all combine to demonstrate that it gives the courts broad discretion in the framing of decrees and that Congress did not intend to make any particular form of relief mandatory.

B. Section 7 Does Not Make Divestiture Mandatory.

The Government nevertheless argues that even in a proceeding under Section 15 divestiture is the only proper remedy for a violation of Section 7 because "the violation here is the acquisition of stock" (br., p. 30) and because the

---

* See also *United States* v. *Hilton Hotels Corp.*, CCH Trade Cases, §68,253 (N.D. Ill., 1956) (divestiture of assets previously owned, but no divestiture of acquired property); *United States* v. *Minute Maid Corp.*, CCH Trade Cases, §68,131 (S.D. Fla., 1955) (partial divestiture of acquired property); *United States* v. *Hertz Corp.*, CCH Trade Cases, §69,762 (N. D. Ill., 1960) (partial divestiture of acquired property); *United States* v. *Anheuser-Busch, Inc.*, CCH Trade Cases, §69,599 (S. D. Fla., 1960) (alternative injunctive relief provided if divestiture not feasible); *United States* v. *Lucky Lager Brewing Co. of San Francisco*, CCH Trade Cases, §69,160 (D. Utah, 1958) (alternative relief provided if divestiture not feasible).

** These agencies were acting under Section 11, not Section 15, but the Government predicates its argument that Section 15 requires divestiture largely upon the language of Section 11.

"continued holding of General Motors stock has been determined to be a violation" (br., p. 35). From this premise, the Government argues that the only way to "prevent and restrain the violation" (as required by Section 15) is to require divestiture. But the Government's premise is false, for it ignores the plain language of Section 7, which prohibits only those acquisitions which have specified illegal effects. The Government misconceives both what Section 7 prohibits and what this Court has ordered in this very case.

Section 7 provides that no corporation shall acquire the stock of another "where the *effect* of such acquisition may be to substantially lessen competition * * *, to restrain such commerce * * * or tend to create a monopoly * * *." (Italics supplied.) There is nothing in the statute which says that the acquisition—or the continued holding—of the stock is unlawful *per se* without the probability of the adverse effects on competition at which the statutory provision is directed. As was stated in *Aluminum Company v. Federal Trade Commission*, 284 Fed. 401, 405 (C.C.A. 3, 1922), certiorari denied, 261 U. S. 616 (1923):

> "Clearly, the object to which the Section is directed is not the mere acquisition of stock of one corporation by another. It is the 'effect' of such acquisition upon commerce."

A violation of Section 7 thus consists of two ingredients —acquisition plus probable injurious effect on competition. If either is removed, the object of the provision will be achieved. Nothing in the statute compels a court of equity to attain this goal by the elimination of one factor rather than the other.

If the unlawful effect of an acquisition results from the exercise, or fear of the exercise, of power through the use of some of the incidents of stock ownership, such as voting rights, the elimination of the unlawful effect

through divestiture of those incidents of ownership is clearly an appropriate remedy. Certainly nothing in Section 7 requires more.

This reading of Section 7 is supported by this Court's opinion and judgment in the present case, and also, as we show at pp. 116-117, *supra*, and pp. 128-129, *infra*, by a number of orders consented to by the Department of Justice or entered by administrative agencies charged with enforcement of that section. The opinion emphasizes that the Government may bring its action not merely at or near the time of the acquisition but "at any time when a threat of the *prohibited effects* is evident" (353 U. S. at 598), and that the incipiency at which Section 7 was directed was the time "when the acquisition threatens to ripen into a *prohibited effect*" (p. 597) (italics supplied). And, as has been pointed out (*supra*, p. 30), this Court directed the elimination of "the effects of the acquisition" (p. 607), not of the acquisition itself. This indicates not only that the acquisition and holding of stock would not be illegal without the prohibited effects, but that the statute would be satisfied by a decree which eliminated only the latter.

In this respect the Clayton Act is similar to the Sherman Act, which does not declare "combination" as such to be illegal, but only a "combination • • • in restraint of trade". When combinations have been found to be unlawful because of acts which have had a restraining effect, the remedy has frequently been to strike at the possibility of continuance of the effect without dissolving the combination, although, of course, dissolution has been ordered in other cases where it was deemed necessary. Thus, it was regarded as sufficient to order defendants to cease and desist from the conduct constituting or causing the unlawful restraint, without dissolution of the combination, in such cases as *Fashion Originators' Guild* v. *Federal Trade Com-*

mission, 28 FTC 430, 469-474 (1939), affirmed 312 U. S. 457 (1941); *Eastern Retail Lumber Dealers' Association*, 1 *Decrees and Judgments in Antitrust Cases* 298, 303 (1913), affirmed 234 U. S. 600, 614 (1914); *Sugar Institute* v. *United States*, 297 U. S. 553, 602-605 (1936); *Associated Press* v. *United States*, 326 U. S. 1, 21 (1945).

Similarly, monopolistic combinations resulting from stock acquisitions have not been dissolved or the stock ordered divested where the court found that there was good reason for approving another form of adequate relief. In *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912), *supra*, p. 114, this Court denied the Government's request for dissolution of an unlawful combination of terminal facilities resulting from the defendant Association's acquisition of competing bridge and ferry companies. It held that the combination could remain in existence if the effects condemned by the statute were eliminated by modification of the existing agreement and prohibition of specified restrictive practices. Similarly, in *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656 (N.D. Ohio, 1914), *supra*, pp. 114-115, an expediting court composed of three circuit judges granted injunctive relief against the unlawful practices of an unlawful combination of towing companies, but refused to order dissolution or divestiture.

The Government has contended that the *Terminal Association* and *Great Lakes Towing* cases are distinguishable because in neither did the court hold unlawful the existence of the corporation into which the component enterprises had been unlawfully combined. But in those cases the combinations were held to violate the law not merely because the components had combined into a single company, but because of the restraining effect of their conduct. Similarly in this case under Section 7, du Pont's acquisition and holding of General Motors stock became illegal only when ac-

companied by probable harmful effects on competition. The courts in those cases recognized, as did the District Court here, that the statutes do not require divestiture or dissolution if the prohibited restraints on competition can be eliminated by other means.

The Government cites a number of Sherman Act and Clayton Act cases in which divestiture or dissolution has been ordered (br., pp. 35-36, 32-33). But those cases prove only that divestiture is an appropriate form of relief when circumstances call for it, not that it is mandatory. See pp. 50-51, *supra*. Never in any suit to enforce either the Sherman Act or Section 7 has it been held that the drastic remedy of divestiture must invariably be used. To impose such rigidity in Section 7 cases but not in Sherman Act cases would indeed be anomalous. For this would mean, as the District Court pointed out (R. 3202), that divestiture would be mandatory upon a finding of mere *probability* of restraint or monopolization in violation of the Clayton Act, but would be only discretionary in cases of *actual* monopoly or combination in violation of the Sherman Act.

C. Section 11 Does Not Require Divestiture in Cases Brought Under Section 15.

The Government's argument that divestiture is required is based largely on Section 11 of the Clayton Act (15 U.S.C. §21), which defines the authority of the Federal Trade Commission and other agencies in Clayton Act proceedings instituted by them. The Government contends that Section 11 requires those agencies to order divestiture to remedy all violations of Section 7, and (although this is a suit in equity brought under Section 15 rather than a Federal Trade Commission proceeding under Section 11) further contends that Section 11 is infused into Section 15 and is "a guiding light" to the interpretation of Section 15.

We shall show (1) that Section 11 does not limit the discretionary powers of district courts proceeding under Section 15 or manifest a Congressional intention that divestiture be mandatory in all Section 7 cases, and (2) that Section 11 does not require administrative agencies to order divestiture in all Section 7 cases.

1. **Section 11 does not limit the discretionary powers of district courts proceeding under Section 15.**

The Government does not go so far as to argue that Section 11 actually governs suits in equity in the district courts under Section 15. On its face, Section 11 merely describes the authority vested in the administrative agencies to enforce Sections 2, 3, 7 and 8 of the Clayton Act.* Nothing in the section is concerned with or in any way prescribes or limits the authority of equity courts in suits instituted under Section 15. The passage upon which the Government relies states that if the commission or board shall find that any of the provisions of Section 7 (or Sections 2, 3 or 8) have been or are being violated it

> "shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and

* The first paragraph of Section 11, as amended, vests authority to enforce Sections 2, 3, 7 and 8 of the Clayton Act in the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board and the Civil Aeronautics Board in their respective fields and in the Federal Trade Commission elsewhere. The second paragraph describes the procedure before the commission or board: a complaint shall issue, a hearing scheduled, testimony taken, an order entered. The third paragraph provides that if the respondent fails to obey the order, the commission or board may seek enforcement in a court of appeals, and describes the procedure to be followed. The fourth paragraph permits a respondent to seek review of an adverse order in a court of appeals. And the next paragraph states that "the jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive."

divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order."

The statutory provision in Section 11 that "the commission or board" shall act in a particular way can hardly be interpreted to restrict the general equitable power which another section of the same act vests in the courts. As this Court stated in *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944) (see pp. 111-112, *supra*), "if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made", and (p. 330) no "major departure from that long tradition * * * should be lightly implied." Neither the history of Section 11 nor any case under it justifies such an implication with respect to the *judicial* enforcement of Section 7 under Section 15.

The decision of this Court in *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953) is inconsistent with the Government's theory that in cases brought under Section 15 (such as that case and this one), the word "shall" in Section 11 makes mandatory the action described thereafter. The *Grant* case was a civil suit under Section 15 alleging violation of Section 8 of the Clayton Act, which prohibits interlocking of corporate directors. Section 11 requires that, upon finding that "any person is violating or has violated" Sections 7 or 8, the administrative agency *"shall"* order the respondent (1) "to cease and desist from such violations," and (2) "divest itself of the stock held or rid itself of the directors chosen contrary to the provisions" of those sections (italics supplied). The Court held that resignation of the defendant director from one of each pair of competing companies did not render the case moot, but nevertheless found that the District Court did not abuse its discretion in denying injunctive relief (the equivalent of a cease and desist order), which on the Government's

theory would be mandatory under Section 11. The Court mentioned that section only to reject the argument that it provides an exclusive sanction, and referred to "Congress' design to provide a scheme of dual enforcement for the Clayton Act" in Sections 11 and 15 (345 U.S. at 631-632). That case demonstrates that Section 11 does not make any form of relief mandatory for district courts proceeding under Section 15.

The Government argues (br., pp. 37-39) that legislative history supports its position, relying particularly on the report of the Senate Committee from which Section 11 emanated. S. Rept. No. 698, 63rd Cong., 2nd Sess. This is the same report (referred to at p. 113, *supra*) which stated (on p. 50) that Section 15, "is existing law, [and] is not proposed to be changed in any particular", and which quoted (on p. 17) a paragraph from the House Report saying that the Section was taken from Section 4 of the Sherman Act without change. The portions of the report on which the Government relies state only that the Senate Committee had eliminated the criminal penalty and that the new Section 11 was "an entirely new provision * * * intended to provide the administrative agency through which sections 2, 4, 8 [now 7], and 9 are to be enforced" (p. 48). The most that the passages cited by the Government show is that it was expected that the Federal Trade Commission would be the principal enforcement agency, not that the powers of the courts under Section 15 were being narrowed. None of the references to Section 11 even mentions Section 15. Section 15 was not modified after the introduction of Section 11, and was passed exactly as originally proposed in the House.

The Government says that there is no good reason for giving district courts greater discretion than administrative agencies in fashioning remedies, and that if divestiture

is mandatory for the agencies it should be mandatory for the courts. But this ignores the fact that Congress was vesting new and limited power in administrative agencies "possessing only such powers as are granted by statute" and not having "the additional powers of a court of equity to grant other and further relief." *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U.S. 587, 598 (1934). "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. * * * It has not been delegated the authority of a court of equity." *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 623, 624 (1927); *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554, 561 (1926). It was not necessary for Congress to spell out the large discretion of the equity courts "to model their judgments [under Section 15] to fit the exigencies of the particular case" (353 U.S. at 608), since that had been defined both by long tradition and by cases applying the identical provision in the Sherman Act. Nothing in the statute or its history suggests an intention to narrow that traditional authority.

It is true, as the Government asserts, that separate provisions of a law are not to be construed in isolation, and that Sections 11 and 15 are parts of the same statute. But this does not mean that provisions which read differently must be construed identically, or that a flexible grant of jurisdiction to district courts must be interpreted as narrowly as a much more restrictive delegation to administrative agencies. When sections of the same law are written entirely differently, the very contrast justifies the assumption that they were not intended to have the same meaning. Cf. *United States* v. *Bess*, 357 U. S. 51, 57 (1958); *Benanti* v. *United States*, 355 U. S. 96, 105 (1957). This would seem particularly clear when Congress models one remedial provision of an act (Section 15 of the Clayton Act) on a provi-

sion of a law passed twenty-four years before (Section 4 of the Sherman Act), but frames another (Section 11 of the Clayton Act) along very different lines. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 478-479 (1952).

It should be noted, furthermore, that the very cases cited by the Government which hold that one provision of the Motor Carrier Act may serve "as a guiding light" in the interpretation of another, hold that this is "not * * * a rigid limitation", and that "where 'special circumstances' prevail" the two provisions need not be applied in the same way. *American Trucking Associations* v. *United States*, 355 U. S. 141, 149, 152 (1957); *American Trucking Associations* v. *United States*, 364 U.S. 1, 11, 17 (1960).*

The reasoning of those cases, if deemed applicable here, would still support the decree below. Although complete divestiture of all the incidents of stock ownership is a simple and common remedy for Section 7 violations (particularly when the suit and the acquisition are substantially contemporaneous rather than 30 years apart; see pp. 60-61, *supra*), the conditions here are indeed extraordinary and warrant the adoption of less drastic relief. The injury which divestiture in this case would cause to innocent persons is unparalleled in any other litigation. This, therefore, is the unusual case, "where 'special circumstances' prevail," justifying resort to a different remedy to effectuate the Congressional purpose.

2. Section 11 does not require administrative agencies to order divestiture in all Section 7 cases.

The premise of the Government's contention that divestiture is mandatory in Section 7 cases under Section

* In those cases this Court was concerned with two sections vesting power in the same administrative agency, not with a broad grant to the courts and a narrow delegation to several administrative bodies.

15 is that it is mandatory in administrative proceedings brought under Section 11. The language of Section 11, however, does not require such an interpretation, as the administrative agencies acting under that section have recognized.

Section 11 provides that an administrative agency, finding that certain sections of the Clayton Act "have been or are being violated, * * * shall issue * * * an order requiring [the violator] * * * to cease and desist from such violations and divest itself of the stock *held* * * * *contrary to the provisions of* section seven * * *, if any there be, * * *." (Italics supplied.) The Government emphasizes the phrase "shall issue * * * an order requiring" divestiture, but neglects the context in which that language appears.

The section requires divestiture not of *all* stock held by the violator, but rather "of the stock held * * * contrary to the provisions of section seven". Section 7, which is thus incorporated into Section 11 by reference, prohibits not all acquisitions, but only those having specified harmful effects. See pp. 118-119, *supra*. Where, as here, the unlawful effects of a particular acquisition are eliminated by deprivation of voting rights, prohibition of interlocking directors and employees, and appropriate injunctive provisions, the stock will no longer be "held contrary * * * to the provisions of section seven", and the statutory language regarding divestiture will be inapplicable. This is all that is required to effectuate the purposes of Section 7.

The administrative agencies which enforce Section 11 have not construed it as requiring the sale of the stock found to have been unlawfully held. This appears from the Federal Trade Commission's decision in *In the Matter of Arrow-Hart & Hegeman, Inc.*, 16 FTC 393 (1932), affirmed 65 F. 2d 336 (C.C.A. 2, 1933), reversed on other

grounds, 291 U. S. 587 (1934)*, as described in the Government brief (p. 33, n. 21). A holding company had acquired all of the stock of two competing companies. The Commission ordered the holding company to dispose of the stock of either one of the operating companies (291 U. S. at 593-594), allowing retention of the other because (as the Government says) "upon such divestiture the stock not divested would not be illegally held" (Govt. br., p. 33, n. 21). But this would be so only because such limited divestiture would effectively eliminate all of the offensive effects of the acquisition. The case thus is one in which it was not found necessary to order complete divestiture of unlawfully acquired stock when the likelihood of future restraint of competition could be eliminated by less drastic relief. The judgment in the instant case accomplishes the same result by eliminating those incidents of stock ownership which might lessen future competition.

A number of consent decrees accepted by the Federal Trade Commission have not required divestiture of all of the property or stock alleged to have been unlawfully acquired. E.g., *In the Matter of Diamond Crystal Salt Co.*, FTC Dkt. #7323, CCH Trade Regulation Reporter, ¶28,559 (1960); *In the Matter of Vendo Co.*, 54 FTC 253 (1957); *In the Matter of International Paper Co.*, 53 FTC 1192 (1957). Thus, in the *Diamond Crystal Salt* case, Diamond, the fourth largest producer of dry salt, acquired the sixth largest, Jefferson Island, with properties both at Jefferson Island, Louisiana, and at Seneca Lake, New York. The decree ordered sale of the latter property, and required Diamond to make available to other salt producers up to 30% of the salt mined at Jefferson Island, but

* This Court reversed on the ground that the Commission had exceeded its authority (see p. 130, *infra*). Chief Justice Hughes and Justices Brandeis, Stone and Cardozo would have affirmed.

allowed Diamond to retain all of the other assets obtained through the acquisition. Similarly, in the *International Paper* case, International had acquired Long-Bell Lumber Company, which in turn owned the stock of Long View Fibre Company. International was ordered to dispose only of the stock of the latter, and to sell to other purchasers in the Western area up to 40% of its production of paperboard. These decrees illustrate how the Commission, operating under Section 11, strikes at the offensive effects of an acquisition without undoing the acquisition itself when unnecessary to the attainment of effective relief.

The Interstate Commerce Commission, which is charged with the responsibility for enforcing Section 7 with respect to railroads, has in Section 7 cases permitted transfers of acquired stock to an independent trustee under a voting trust, in lieu of complete divestiture of title. *New York, Chicago and St. Louis R. Co. Control*, 295 ICC 703 (1958); *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 183 ICC 165 (1932); *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 156 ICC 607 (1929); cf. *Chesapeake & Ohio Ry. Co. Purchase*, 271 ICC 5, 43 (1948). These arrangements permitted the acquiring carriers to retain title to the stock and the dividends therefrom, as does the judgment entered here.

There are of course numerous cases, some of which are cited by the Government (br., pp. 32-33), in which the administrative agencies have ordered divestiture, but in none did they say that it was required as a matter of law. Indeed, no court or agency has ever held that agencies lack discretion to fashion alternative methods of relief when appropriate in the public interest, and the practice of the agencies shows that they assume that they possess such power.

The Government argues to the contrary, however, relying on language in this Court's opinions in *Federal Trade*

Commission v. *Western Meat Company*, 272 U. S. 554, 559 (1926) and *Arrow-Hart & Hegeman Electric Company* v. *Federal Trade Commission*, 291 U. S. 587 (1934). In neither of these cases was the Court concerned with or focusing upon the problem here presented. In *Western Meat* the issue was whether the Commission had power to require a respondent to divest itself of assets obtained through an unlawful acquisition of stock. The Court held that the Commission could enter such an order only if the assets had been acquired after the proceeding had begun, but not otherwise. There was no issue as to whether the Commission had authority to devise other types of remedy in lieu of divestiture. Similarly, in the *Arrow-Hart* case the question on which the Court divided was whether the Commission had power to order divestiture of more than the illegally acquired stock, not whether complete divestiture was mandatory in every case. In fact, as we have seen (*supra*, p. 128), in *Arrow-Hart* the Commission ordered divestiture of only a portion of the stock held to have been illegally acquired.

This Court has often stated that:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (*Cohens* v. *Virginia*, 6 Wheat. 264, 399-400 (1821); *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627 (1935)).

This Court has never been faced with the necessity of deciding—and has never decided—whether divestiture is mandatory under Section 11. Since this is not a case brought under Section 11, that point need not be reached here.

But whatever Section 11 means with respect to administrative agencies, it does not apply to courts of equity under Section 15. Equity courts should not be tied to any particular form of relief, without regard to the availability of other effective remedies which would achieve the Congressional purpose with less harm to the interests of innocent persons.

CONCLUSION

The District Court, in the exercise of its broad discretion, has formulated a decree which fully complies with the mandate of this Court and the relevant statutory provisions. The judgment below should therefore be affirmed.

Respectfully submitted,

LEO F. TIERNEY,
ROBERT L. STERN,
BRYSON P. BURNHAM,
LEE N. ABRAMS,
231 South La Salle Street
Chicago 4, Illinois

HENRY M. HOGAN,
ROBERT A. NITSCHKE,
3044 West Grand Boulevard
Detroit 2, Michigan
Attorneys for General Motors Corporation

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT,
Of Counsel

APPENDIX

STATUTES INVOLVED

The Clayton Act (38 Stat. 730, 15 U.S.C. §§ 12-27) provides in part as follows:

"Section 7. [38 Stat. 731-732; 15 U.S.C. §18.] No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

* * *

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. * * *

* * *

"Section 11. [38 Stat. 734-736; 42 Stat. 169; 48 Stat. 1102; 15 U.S.C. §21.] Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon

a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon

shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if

supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

* * *

"Section 15. [38 Stat. 736; 15 U.S.C. §25.] The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * * "